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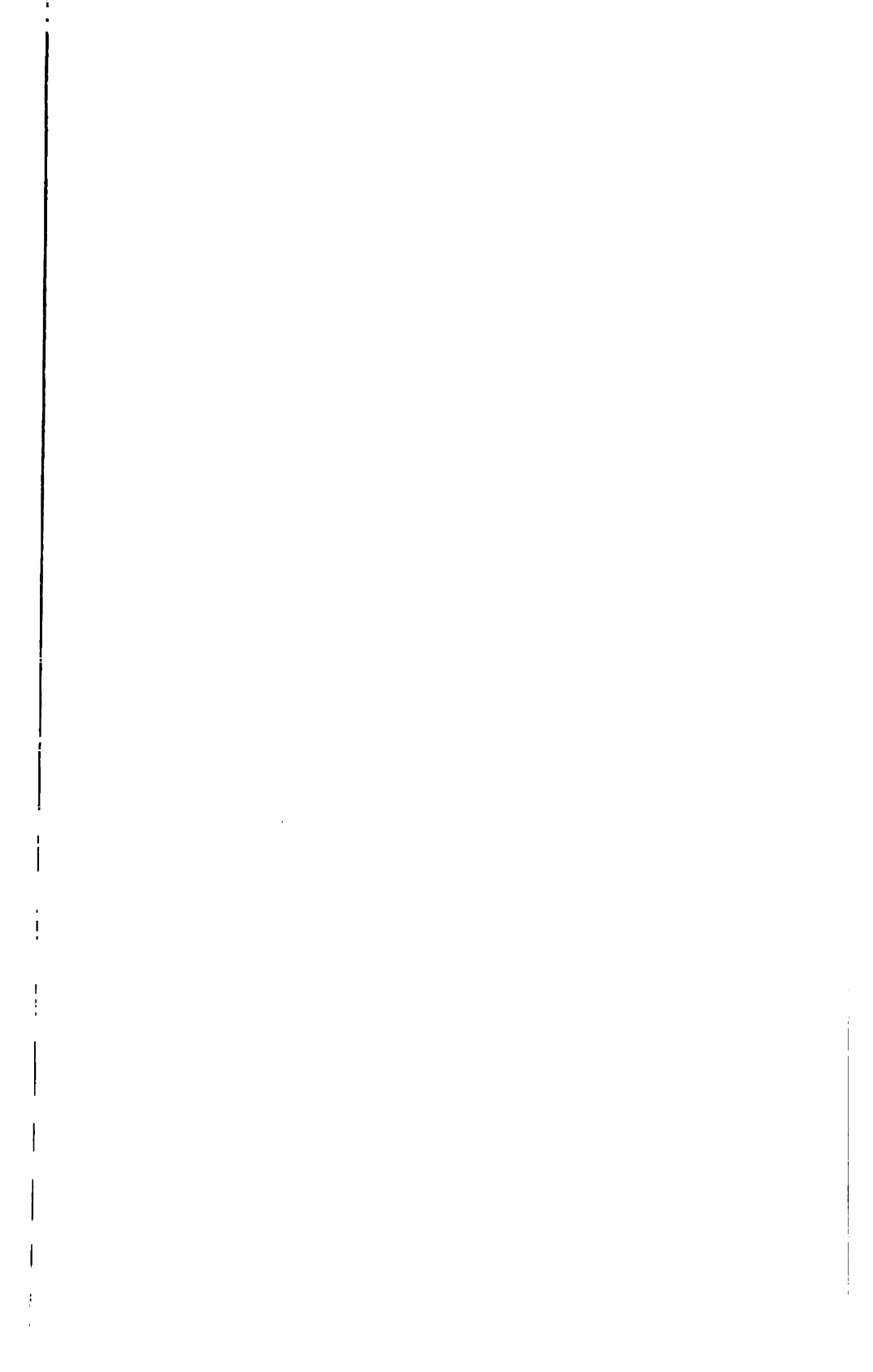
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REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

BY THE

RIGHT HON. SIR J. L. KNIGHT BRUCE,
VICE-CHANCELLOR.

BY

JOHN P. DE GEX AND JOHN SMALE,

OF LINCOLN'S-INN, ESQUIRES, BARRISTERS-AT-LAW.



VOL. III.

HILARY TERM, 13 VICT. TO EASTER VACATION, 14 VICT.,
WITH A FEW LATER CASES.



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Lord Chancellor . . LORD COTTENHAM.

*Lords Commissioners
of the Great Seal* . { LORD LANGDALE.
SIR LANCELOT SHADWELL.
MR. BARON ROLFE.

Master of the Rolls . LORD LANGDALE.

*Vice-Chancellor of Eng-
land* } SIR LANCELOT SHADWELL.

Vice-Chancellors . . . { SIR JAMES LEWIS KNIGHT BRUCE.
SIR JAMES WIGRAM.

Attorney-General . . SIR JOHN JERVIS.

Solicitor-General . . SIR JOHN ROMILLY.

ERRATA.

- Page 122, lines 2, 7, 13, 26, for Robinson, read Richardson.*
140, line 1 of marginal note, dele A plaintiff in.
304, at end of marginal note, in a few copies, dele to renew.
330, column 2 of note, line 2, for My. & K. read Russ. & My.
334, line 18, for defendant read plaintiff.
497, line 6, for Secretary read Solicitor.
685, line 2 of marginal note, for her read his.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

COMMENCING IN

HILARY TERM, 13 VICT. 1849.

1849.

Ex parte CAPPER,

In the Matter of THE LONDON, BRISTOL, AND SOUTH WALES DIRECT RAILWAY COMPANY; *June 1st (a).*

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848.

THIS was a petition for winding up the affairs of the above Company, which was provisionally registered. The petitioner became, in July, 1847, the holder of scrip certificates for fifty shares in the Company, and received back, on account of the deposit on the shares, 1*l.* per share, with a certificate or memorandum, to the effect that the holder of that document would be entitled to a pro rata division, on fifty shares, of any balance remaining after final settlement of all claims on the Company. He had not, however, signed the subscribers' agreement or subscription contract.

A scrip-holder in a provisionally registered Railway Company, who has not signed the subscription contract, may present a petition to wind up the Company.

Mr. Malins and Mr. Baggallay supported the petition, and said, that the petitioner had had no opportunity of inspecting the accounts.

(a) These cases, under the Joint-stock Companies Winding-up Acts, are given out of their chronological place, in order to publish them as early as possible.

VOL. III.

B

D. G. S.

Carrick's Case / Sim. N. 513.

1849.
Ex parte
 CAPPER,
In re
 THE LONDON,
 BRISTOL, AND
 SOUTH WALES
 DIRECT
 RAILWAY CO.

Mr. *Wigram* and Mr. *Hardy*, for the respondents, objected, that, as the petitioner had not signed the deeds, he was under no liability, and was not entitled to present the petition. They also read affidavits to shew that the majority of the shareholders, in the proportion of seven to one, were adverse to the application.

The VICE-CHANCELLOR made an order similar to that made in *Ex parte Pocock* (a).

(a) 1 De G. & S. 731.

Ex parte WALTER,
 June 4th. In the Matter of CAMERON'S COALBROOK STEAM COAL, SWANSEA, AND LONGHOR RAILWAY COMPANY;

AND
 In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848.

Where a shareholder in a Railway Company had applied to the Court of Bankruptcy for protection, and had entered into an arrangement with his creditors, under 7 & 8 Vict. c. 70:—*Held*, that he could not petition to have the Company wound up under the Joint-stock Companies Winding-up Act, without serving the petition upon the trustees under the deed of arrangement.

THIS was the petition of a contributory to the above Company to have its affairs wound up under the Joint-stock Companies Winding-up Act.

In February, 1848, the petitioner had applied to the Court of Bankruptcy, under the 7 & 8 Vict. c. 70, for protection, and to carry into effect an arrangement for vesting his effects in trustees, for payment of his debts. On this application an arrangement had been made and a trustee appointed.

Mr. *Swanston* and Mr. *Hetherington* supported the petition.

Mr. *Russell*, Mr. *Malins*, Mr. *T. H. Terrell*, and Mr. *W. W. Cooper* appeared for the respondents.

The VICE-CHANCELLOR held, that the petition could not proceed in the absence of the trustees of the deed of ar-

rangement, but gave no opinion whether an order could be made upon it, if it were served upon them.

On the application of the counsel for the petitioner, his Honor ordered the petition to stand over, with liberty to serve it on any person not already served. No further proceeding has been, however, taken.

1849.
Ex parte
 WALTER,
In re
 CAMERON'S
 COALBROOK
 STREAM COAL,
 SWANSEA, AND
 LONGHOR
 RAILWAY CO.

Ex parte PHILLIPS,

In the Matter of THE LONDON AND WESTMINSTER INSURANCE COMPANY; *June 22nd.*

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP Act, 1848.

THIS was the petition of a contributory to have the affairs of a Life Assurance Company wound up under the Joint-stock Companies Winding-up Act, 1848. The Company had been dissolved, and their business transferred to another Company; and there were assets to the extent of 4000*l.* to divide after payment of the debts.

Winding-up order made in the case of an insurance Company which had been dissolved and its business transferred to another office, there remaining a sum of 4000*l.* to be divided among the shareholders.

Mr. *Cole* supported the petition.

Mr. *Grove*, for a director, consented.

Mr. *Ewart*, for another contributory, contended that it was not a case for an order.

2 Aug. 49. J. 365.

The VICE-CHANCELLOR considered, that, as there was a fund to be divided, the Act applied, and made the order.

1849.

Ex parte MURRELL,

June 22nd. In the Matter of THE LONDON AND SOUTH ESSEX RAILWAY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848.

A shareholder in a dissolved Railway Company had expressed himself satisfied with an account produced to him, and received, in 1847, a second dividend in part return of his deposit, and under the designation of a final dividend, leaving only 22*l.* of his deposit unreturned. In 1849 he presented a petition to have the Company wound up under the Act of 1848, when there appeared to be no debts due from the Company, nor any assets, except such as might be procured from reopening the accounts, or recovering from subscribers the amounts unpaid on their deposits:—*Held*, not a case for a winding-up order, nor for ordering the petition to stand over to allow an inspection of the accounts of the Company.

THIS was the petition of a shareholder to wind up the affairs of the above Company, which was, in July, 1845, provisionally registered under the 7 & 8 Vict. c. 110. The proposed capital was 900,000*l.*, in 18,000 shares of 50*l.* each, with a deposit of 2*l.* 15*s.* per share. Twenty shares were allotted to the petitioner, and he paid the deposits thereon, and executed the subscribers' agreement and parliamentary contract in respect of them.

The petition and affidavit in support of it stated, that other persons had applied for shares, and agreed in writing to take them and pay the deposit; and that, accordingly, shares were allotted to them, but that they refused or neglected to pay their deposits thereon; and that no application had been made to Parliament for a bill for the purpose of authorising the construction of the intended railway. That the petitioner, by himself and his solicitor, had in 1846 made repeated applications to the secretary, for an inspection of the accounts of the Company, and for an account of the application of the deposits, but had hitherto been unable to obtain any account whatever.

That, in July, 1846, the petitioner received a letter from the secretary, stating that the sum of 1*l.* 10*s.* per share, in respect of the balance of deposits received, was in course of payment at the office; and that, as soon as the few outstanding accounts could be got in and adjusted, the remaining balance would be rateably divided amongst the scrip-holders. That the Company had not been dissolved, but had ceased to carry on business, and that the secretary and clerks had been discharged, and the place of

Ex parte Williams 1 Sim. N. S. 61. *Ex parte James*
id 145. *In re New Gas Generator* 10 4. Ch. D. 875

business of the Company abandoned, although its affairs had not been fully wound up; that various questions would arise on the winding up of the affairs of the said Company, which could only be settled under the provisions of the Winding-up Act. That, in April, 1846, the petitioner wrote to the secretary of the Company, requiring to be informed of the amount then subscribed, the number of shares applied for and the number allotted, the amount of the expenses the committee had already incurred, and also whether the committee had allotments made to them, and whether they took up and paid for all such allotments. That, in reply to such letter, the secretary wrote to the petitioner a letter stating that the provisional directors could not give the information required, previously to the general meeting of the scrip-holders, which had been convened for the 7th of May. That the petitioner attended the meeting of the 7th of May, and inquired of the chairman the reason why the whole of the shares in the said Company had not been allotted; but the chairman declined to answer such inquiry. That, on the 16th of June, 1846, the petitioner again wrote to the secretary of the Company, stating that he perceived, by an advertisement, that the Company had been dissolved, and requiring to know whether it was the intention of the Company to return the deposit in full that had been paid (2*l*. 15*s*. per share), and stating that, if not, he should instruct his solicitor to proceed for the recovery thereof; that the secretary in reply wrote, that he was desired by the directors to say that they considered a sufficient answer would be given to the petitioner's letter by referring him to the terms of the advertisement issued by the Company.

In opposition to the petition, the solicitor to the Company deposed, that, on the failure of the bill in the House of Commons in the session of 1846, the promoters proceeded to wind up the affairs of the Company and return the

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MURRELL,
In re
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AND SOUTH
ESSEX RAIL-
WAY CO.

1849.

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MURRELL,
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WAY Co.

shareholders the surplus of the deposits paid by them, after deducting the debts and expenses incurred in and about the said bill and the application to Parliament; that the petitioner received 30*l.* in part return of his deposits, being at the rate of 30*s.* per share, and thereupon he signed and gave to the secretary a letter, or memorandum, as follows:—

“London and South Essex Railway Company,
“November, 1846.

“I acknowledge that I have surrendered to the provisional directors scrip (or bankers’ receipt) for 20 shares in this Company, numbered 1211 to 1230, in exchange for the first instalment in respect thereof; and I hereby undertake to give such further receipt or discharge as may be required by the said directors.

	(Name)	“HENRY MURRELL,
“No. 294.”	(Address)	“41, Threadneedle-street.

That, on the 29th of October, 1846, the deponent produced an account to the petitioner, who, after reading and considering it, expressed himself satisfied therewith, and stated to the deponent, that he should send his scrip to the secretary and should accept the amount proposed to be returned as the balance due to him in respect of such deposits; and that accordingly, on the 1st of February, 1847, he received 3*l.* 5*s.* as the second and final instalment of 3*s.* 3*d.* upon each of his shares.

Mr. *Malins* and Mr. *Roxburgh* supported the petition.

Mr. *Lloyd* and Mr. *Bigg* opposed it.

The VICE-CHANCELLOR:—

This Company, whether formally dissolved or not, is substantially at an end, and has for years been so. There are no outstanding liabilities, and no assets except such as

may be obtained by re-opening the accounts of the directors, and enforcing contribution by recovering from such of the shareholders as have not paid up their subscriptions in respect of their shares. And I must view this as the petition of Mr. Murrell only, and the object of it as being merely the recovery of 22*l*, he having received back the whole of his deposit except that amount. Now this is asked in a case in which the petitioner, in 1847, received a second dividend under the designation of a final dividend, and in which he does not allege that he has since discovered anything of which he had not then notice. In this state of things I decline making the order sought.

1849.
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MURRELL,
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THE LONDON
AND SOUTH
ESSEX RAIL-
WAY CO.

Mr. *Malins* asked that the petition might be ordered to stand over to give the petitioner an opportunity of inspecting the accounts. But

The VICE-CHANCELLOR dismissed the petition, without costs.

Ex parte **HOLINSWORTH** and Another,
 In the Matter of **THE GREAT WESTERN, SOUTHERN, AND** *June 29th.*
EASTERN COUNTIES, OF IPSWICH AND SOUTHAMPTON RAIL-
WAY COMPANY;
 AND
 In the Matter of **THE JOINT-STOCK COMPANIES WINDING-UP**
ACT, 1848.

THIS was the petition of two of the directors of the above Company, for the usual winding-up order.

The Company was provisionally registered according to the provisions of the 7 & 8 Vict. c. 110.

Roger Holinsworth, one of the petitioners, in October,

Where members of the provisional committee of a projected Railway Company have with others incurred liabilities with refer-

ence to the intended Company, they are entitled to have the affairs of the Company wound up, although such liabilities may not affect the general body of subscribers.

1849.
Ex parte
 HOLINSWORTH,
In re
 THE GREAT
 WESTERN,
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 EASTERN
 COUNTIES
 RAILWAY CO.

1845, subscribed for 200 shares, and paid 20*l.* by way of deposit.

The other petitioner, John Mollady, in October, 1845, subscribed for 200 shares, and paid 20*l.* deposit. The petitioners were two out of 150 provisional committee-men, and of a committee of 17 directors.

Mr. Prichard, one of the original projectors of the Company, was employed on behalf of the Company, as one of the engineers, in making plans and sections of their intended line of railway, and continued to make such plans and sections until November, 1845, when it was determined, at a public meeting of the Company, that Mr. Prichard should proceed to complete the plans, sections, and book of reference with respect to a portion only of the intended line. The plans were completed and deposited, pursuant to the standing orders of the Houses of Parliament.

A special meeting of the provisional committee and of the committee of direction of the Company was held on the 23rd of December, 1845, when, in consequence of the general panic in the railway market, it became evident that the Company could not proceed, and it was thereupon agreed and resolved, that all further proceedings should be suspended, and the same were suspended accordingly.

Several meetings of the committee and directors took place after the 23rd of December, 1845, and many of the directors paid and subscribed sums of money for the purpose of discharging the claims and demands against the Company, but not sufficient to meet all such claims and demands.

The Company had ceased to have any office or place of business, or any officer or servant.

Various actions had from time to time been brought by the creditors of the Company against members of the provisional committee and of the committee of directors; and in particular, Mr. Charles Barker, in October, 1848, commenced an action against the petitioners, for the amount due to him from the Company for advertisements. The

action came on for trial in February, 1849, when a verdict for 214*l*. 19*s*. 4*d*. was found for the plaintiff, and that amount, together with the costs of the action, had been paid by the petitioners out of their own pockets.

Mr. Prichard had also commenced actions against two of the directors, for services rendered by him to the Company as their engineer; and the petition and affidavit in support of it stated, that there were numerous other claims and liabilities of the Company yet unsatisfied.

The substance of the affidavits in opposition was, that the Company had no pecuniary engagements to meet, except a balance of 80*l*., which they could pay immediately if necessary. That there was no Company, and that there never had been any deed of partnership, the undertaking having been stopped because a sufficient number of persons did not pay the deposit of 2*l*. per share. That there were no contributors liable, their liability being confined by their allotment letters to the payment of 2*l*. per share, which had been paid and applied; and that there were neither assets nor debts of the Company.

Mr. *Hardy* supported the petition.

Mr. *Bacon* and Mr. *Welford* opposed it on behalf of a provisional committee-man, and contended, that whatever liabilities the petitioners might have contracted personally, there were none affecting the general body of shareholders, with reference to whom there was no occasion for the interference of the Court.

The VICE-CHANCELLOR saw no reason why the petitioners were not entitled to the benefit of the Act of 1848, for the purpose of enforcing contribution from others who had become liable, together with them, to the demands in respect of which the proceedings had been taken; and his Honor made the usual order.

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Ex parte
 HOLINGSWORTH,
In re
 THE GREAT
 WESTERN,
 SOUTHERN, AND
 EASTERN
 COUNTIES
 RAILWAY Co.

1849.

June 2nd &
20th.

In the Matter of THE TRING, READING, AND BASINGSTOKE
RAILWAY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

In cases in which the Joint-stock Companies Winding up Act (1848) requires service of the petition for winding up a Company upon an officer or member, there must, in general, be actual service; and an appearance by counsel to consent, at the hearing, is not sufficient.

June 20th.

IN this case an order had been made for winding up the affairs of the above Company, under the Joint-stock Companies Winding-up Act. The Company had become bankrupt under the Act 5 & 6 Vict. c. 111, and had no place of business or office. The petition had not been served on any one; but two of the directors appeared by counsel at the hearing, and consented to the order.

Mr. *Chandless*, on this day, stated that a difficulty had arisen in the Registrar's office in drawing up the order, from the circumstance of there being no affidavit of service of the petition, but only a consent brief on the part of two of the directors.

The VICE-CHANCELLOR said, that, as the Act in terms required the petition to be served, the service had better be made in this case.

The petition was accordingly served, and an affidavit to that effect having been filed, the order was made, dated after the filing of the affidavit.

1849.

Ex parte DALE,

In the Matter of THE TRENT VALLEY AND CHESTER AND
HOLYHEAD CONTINUATION RAILWAY COMPANY;

July 13th.

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

THIS was a petition for the usual winding-up order under the Joint-stock Companies Winding up Act, 1848. A difficulty had arisen in the Registrar's office as to the sufficiency of the service, the petition having been served on the solicitor to the Company only. The Company had long ceased to have any office or place of business.

Service of petition for winding up Company on its solicitor, not sufficient within 10th section of Act.

Mr. Glasse, for the petitioner, submitted to the Court whether the solicitor was not an "officer or servant of the Company" within the meaning of the 10th sect. of the Act.

The VICE-CHANCELLOR thought not, and that the service was insufficient.

Ex parte Holsey first p. 101.

In the Matter of THE ST. GEORGE'S STEAM PACKET COMPANY;

June 7th &

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

July 4th.

JOSHUA PIM'S CASE.

THE St. George's Steam Packet Company was in want of an increase of capital in the year 1840, and, at a board of

Forty shares, called "new shares," were purchased by

B.'s father, and were by his direction transferred into the names of A. and B., without their knowledge. B., after his father's decease, and on becoming his executor, found the certificates of the shares among his father's papers, and, upon the request of the managing director of the Company, sent the certificates to him to be exchanged. Instead of being exchanged they were cancelled, and other shares, being old shares, were transferred, in the Company's books, to A. and B., as upon a sale:—*Held*, that, as to the forty shares, B. was properly excluded from the list of contributories, both in his individual character, and also as representative of his deceased father.

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directors held on the 28th of August, 1840, it was resolved to issue new shares.

During the years 1840, 1841, and up to the 7th of May, 1842, Mr. Joseph Robinson Pim was the acting and managing director of the Company, and Mr. Jonathan Pim, during 1840, and until his death in 1841, was a director of the Company.

Mr. Jonathan Pim having a sum of 2000*l.* in his hands, as trustee for a Miss Goff, invested that sum in forty of these "new shares," and paid the 2000*l.* to Mr. Joseph Robinson Pim, the managing director; who, thereupon, by the direction of Mr. Jonathan Pim, transferred forty of such "new shares," distinguished by numbers 2378 to 2417 inclusive, into the names of Mr. Thomas Harvey and Mr. Joshua Pim (the son of Mr. Jonathan Pim), who were not informed that any shares had been transferred into their names.

"New shares," to the number of 301, had been issued; but it being apprehended that the issue was illegal, they were all called in by the Company, except the above forty "new shares;" and the Company gave in exchange to the holders of the "new shares," when called in, the debentures of the Company for the amounts.

Mr. Jonathan Pim died in 1841, having appointed his son, Mr. Joshua Pim, an executor of his will. Mr. Joshua Pim alone proved his father's will, and shortly afterwards found the certificates of these forty "new shares" among his father's papers.

Upon the application of Mr. Joseph Robinson Pim, and upon his promise to return new certificates for the shares, Mr. Joshua Pim, the executor, gave up the certificates of these forty "new shares;" and thereupon they were entered in the Company's books by their distinctive numbers, and were cancelled. Mr. Joseph Robinson Pim, instead of performing his promise, procured an entry to be made in the Company's books of a transfer dated the 18th of January, 1842, to the effect that forty old shares in the

Company were transferred by Mr. Joseph Robinson Pim to Mr. Thomas Harvey and Mr. Joshua Pim, the executor, but the shares designated by numbers in the margin comprised twenty-seven only.

Mr. Joseph Robinson Pim sent certificates for the designated twenty-seven shares only to Mr. Joshua Pim, accompanied by a letter, addressed to Messrs. Harvey and Joshua Pim, acknowledging the receipt of the remaining thirteen shares, for the purpose of being exchanged, for which he admitted himself to be accountable.

Mr. Joshua Pim, without acting further in the matter, retained the twenty-seven shares in his possession.

In winding up the affairs of the Company in the Master's office, in pursuance of the usual order, the official manager prepared a list of contributories, including the name of Mr. Joshua Pim as a contributory in respect of forty shares, without qualification.

After argument before him, the Master (Mr. Farrer) excluded Mr. Joshua Pim's name from the list, giving the following judgment in writing:—

“I do not think that the conduct of Joshua Pim, after the decease of his father, amounts to an acceptance of the office of trustee of the forty shares, part of the 301 ‘new shares’ issued under the resolution of the 28th of August, 1840, which were registered in the names of Thomas Harvey and Joshua Pim by distinctive numbers. Joshua Pim delivered up these shares to the Company and they were cancelled by the Company, consequently these forty ‘new shares’ have no existence. It is difficult to consider this act of delivering up these shares so much a dealing with them as to operate as an acceptance of the trust. If Joshua Pim is chargeable at all, I think it must be in respect of the twenty-seven old shares; but Joshua Pim cannot be a trustee of these shares, for it appears that he believed he was to have back ‘new shares,’ and therefore his act can only have reference to the forty ‘new shares.’ I am further of

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opinion, that, Thomas Harvey being on the books as co-trustee with Joshua Pim, the latter has a right to say that at most he is only one of two trustees and (which is very important in this case) that his name should stand second in the books of the Company. The name of Thomas Harvey cannot be omitted so as to prejudice Joshua Pim. He has a right, I think, to say that the Company, under the 51st clause, must take all its remedies against Thomas Harvey. I think that the front place given to Thomas Harvey shields Joshua Pim from liability to be included alone in the list. If the acts of Joshua Pim do amount to an acceptance of the trust, they must be referred to the acceptance of a joint, not an individual trust.

"J. W. F., 10th May, 1849."

Mr. Bacon and Mr. J. V. Prior, for the official managers, in support of a motion by way of appeal from the Master's decision.—The acts of Mr. Joshua Pim, the son, in sending the certificates to be exchanged, and in receiving the certificates of the twenty-seven shares and the letter from Mr. J. Robinson Pim, acknowledging that he held the remaining thirteen shares for Mr. Harvey and him, was a recognition of his being the holder of these shares, and therefore a contributory. And he was solely a contributory, inasmuch as Mr. Harvey appeared to be altogether ignorant of any of the transactions.

If Mr. J. Robinson Pim's conduct in these transactions was blameable, he must be taken to be the agent rather of Mr. Joshua Pim, who had notice of a part of that conduct, than of the Company.

Some person ought to represent these shares as a contributory, not being Mr. Harvey; and Mr. Joshua Pim not suggesting that he should be put on the list in his representative character, he should be a contributory in his individual character.

Mr. Roundell Palmer and Mr. Pearson, for Mr. Joshua Pim, were not called upon.

The VICE-CHANCELLOR:—

Mr. Joshua Pim having been at first associated with Mr. Harvey in the registered ownership of these shares, it is incumbent on the official manager to shew that association destroyed or severed.

Mr. Joshua Pim may or may not be personally liable in his own right to all the creditors of this Company. On that point, which I do not consider before me, I give no opinion. The question is, whether, as between the Company and him, they are entitled to say that he is liable, and solely liable, as a contributory in respect of these shares.

I do not question the general proposition, that if a man, without authority, professes to act as agent for another, who afterwards disclaims the act, the person who has so professed to act is personally liable. So in general, a man who contracts in the joint names of himself and another, without authority from that other, is personally liable himself alone. The present case, however, stands on peculiar grounds: this gentleman had nothing whatever to do with the use originally made of his name in conjunction with that of Mr. Harvey. He discovers accidentally, or substantially by accident, that that is the case. Then an officer of the Company applies to him, as I understood it,—at all events, a person acting on behalf of the Company applies to him, to substitute some other shares, or certificates of some other denominations, for those; which is done. It is plain, in my opinion, that this gentleman never meant by that to contract any different liability from such, if any, as he was then under. He meant throughout (if he meant anything) to contract on the joint account of Harvey and himself; and the circumstances of the case preclude the Company from saying, against him, that he contracted otherwise than on the joint account of Harvey and himself. The conclusion is, that, in respect of these shares, this gentleman is either liable with Mr. Harvey, or second-

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arily to Mr. Harvey, or not at all. If the official manager wishes to make an endeavour to bring Mr. Harvey on the list, this application may stand over for the purpose. I do not give any opinion whether he can do that; but I am of opinion, that, as between the Company and this gentleman—to which state of things I cautiously confine myself—it would be the height of injustice to make Mr. Joshua Pim liable alone; and therefore I refuse this motion, with costs.

After this decision was given, the official manager claimed, before the Master, to have the name of Mr. Joshua Pim placed upon the list as executor of Jonathan Pim in respect of the forty cancelled shares.

The Master decided against this claim, and gave the following reasons for his decision:—

“The testator Jonathan Pim, having a sum of 2000*l.* in his hands as trustee for Miss Goff, determined to invest it in shares of this Company, and accordingly paid that sum to J. R. Pim, a director, who thereupon transferred forty ‘new shares’ into the names of Thomas Harvey and Joshua Pim as trustees. These forty shares were called ‘new shares,’ because they had been issued under a resolution of the directors, bearing date the 28th August, 1840, by which the issue of the new 100*l.* shares, on payment of a call of 50*l.*, as set out in the books of the Company, was authorised. The forty shares had their distinctive numbers from 2378 to 2417; but of these ‘new shares’ only 301 were in fact issued; and, under the apprehension that they had been illegally issued, they were all called in by the Company, except these forty, and debentures of the Company were given to the holders in exchange. On the death of the testator, his executor Joshua found these forty ‘new shares’ amongst his papers.

"If he had continued in possession of them a serious question as to their validity might have been raised, and might have been tried, upon a call being made in respect of them; but, upon the application of J. R. Pim, they were delivered up by Joshua Pim, and, being entered by their numbers in the books of the Company, were cancelled, and have now no existence. It is now sought to make the estate of the testator liable to calls in respect of these shares. This is a very different treatment from that which the holders of the rest of the 301 'new shares' experienced; they received and hold debentures of the Company, being converted into creditors instead of holders of shares liable to calls. As to the twenty-seven shares, the estate of the testator can have nothing to do with them; they are old shares, not new. Joshua Pim did not agree to accept them; but that is not the claim raised by the official manager: he seeks to include him in the list in respect of forty shares, and that claim can be referred only to the forty 'new shares' which were in the testator's possession at the time of his death, but which, as above mentioned, have been cancelled. Independently of these circumstances, I do not see upon what ground the testator could have been, or his executor can be, included in the list. He had no interest in the shares, either as trustee or cestui que trust. It appears to me that their transactions relative to these forty shares are in such a state of confusion as to render it impossible to include any person in the list in respect of them. I must exclude Joshua Pim in his representative character.

"J. W. F., June 20th, 1849."

Mr. Bacon and Mr. J. V. Prior, for the official managers, in support of a motion by way of appeal from this decision, contended, that, inasmuch as the Court on the former motion held that the acceptance of the "new shares" did not bind the respondent, it followed that the original liability of the testator's estate remained, and that the respondent

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ought to be placed upon the list in his representative character.

Mr. *Roundell Palmer* and Mr. *Pearson*, for the respondent, were not called upon.

The VICE-CHANCELLOR:—

The question, to what extent (if any) the estate of Jonathan Pim is liable to the creditors of the Company, is not before me. The question before me is between his estate and the partnership. I am of opinion that the effect of the evidence is to establish that the partnership, by its authorised agents, intended to discharge and did discharge the estate of Jonathan Pim from such liability (if any) as it was subject to upon the forty shares. I have not now to decide, nor do I mean to touch or affect any question respecting the twenty-seven substituted shares. The respondent's costs must come out of the estate.

June 20th. In the Matter of THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848.

BURLINSON'S CASE.

A female shareholder in a joint-stock bank married, and her husband received dividends on her shares, signing the dividend warrants per procuration of his wife:—
Held, that he was not entitled

to be removed from the list of contributories under the Joint-stock Companies Winding-up Act, 1848, although he had not fulfilled the conditions prescribed by the deed of settlement for the purpose of entitling the husband of a female shareholder to become a member of the Company.

THIS was a motion by way of appeal from the decision of the Master. On 16th December, 1834, Ann Wetherell, spinster, was the holder of twenty shares in the above Company, by transfer from one Thomas Wood, and she was duly registered and received dividends up to her marriage with the appellant, Frederick Thomas Burlinson, which took place on the 26th September, 1837. No set-

Lucas's Case 1 D. F. & S. 532.

Hoare's Case 2 D. F. & S. 233.

tlement was made on the marriage, and from the time of its solemnization all the dividends on the shares were received by the husband, who had signed six dividend warrants in the following form:—

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Is rs
THE NORTH
OF ENGLAND
JOINT-STOCK
BANKING Co.
BURLINSON'S
CASH.

“ Capital Stock Account. Dividend Warrant, 8*l*. 5*s*.

“ Dividend on Twenty Shares.

“ The North of England Joint Stock Banking Company.

“ Pay self or bearer 8*l*. 5*s*., being a dividend of 8*s*. 3*d*. per share on the paid up capital stock of the Company, in my name, for the year ending the 31st December, 1842, as declared at a general meeting held February, 1843.

“ Per pro. ANN BURLINSON,

“ F. T. BURLINSON.

“ Newcastle-upon-Tyne, 14th March, 1843.”

Another dividend warrant was signed by him in the following form:—

“ For ANN BURLINSON,

F. T. BURLINSON.”

The material clauses in the deed of settlement are set out in *Armstrong's case* (a).

Mr. *Swanston* and Mr. *Elderton*, in support of the motion.—According to the 29th clause of the deed of settlement, the husband of any female shareholder who was desirous of becoming a member of the Company in respect of the shares vested in him in that capacity, must give notice in writing at the Company's banking-house of such his desire, and must comply with the provisions of the deed of settlement. And by the 30th clause, if he does not in this manner elect to become a member, he is not entitled to receive any dividend. By the 31st clause, if he neglects executing the deed of settlement, the directors have power to declare the shares forfeited. The remedy of the Com-

(a) 1 De G. & S. 566.

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pany for non-payment of calls is, therefore, forfeiture. The respondent does not come within any of the definitions of a contributory contained in the Act. The shares did not become the property of the husband absolutely upon the marriage. They were merely choses in action, which he had a possibility of acquiring by reducing them into possession. The receipt of the dividends upon them was not a reduction into possession, for that receipt was in the character of agent of his wife. This was so decided in the case of *Hart v. Stephens* (a), where the Court of Queen's Bench held, that the receipt of interest by a husband, on a promissory note given to his wife, was not a reduction into possession, nor even any evidence of such reduction into possession, but must be considered as a receipt by him, not in his own right, but as agent for his wife. Moreover, the Company, by taking the dividend warrants in the form in which he had signed them, by procuration of his wife, accepted her as a shareholder, without participation on the part of her husband, according to the principle on which your Honor decided *Angas's case* (b). [They also cited *Harwood v. Fisher* (c).]

Mr. Bacon and Mr. Headlam, for the official manager, were not called upon.

The VICE-CHANCELLOR:—

This case is not in the least degree affected, in my opinion, either by the clauses referred to in the deed of settlement, or by *Angas's case*, or by the question, if it is a question, whether the shares have been reduced into possession by the husband. The husband appears to me most clearly liable. In *Angas's case* the Company had never contracted with Mrs. *Angas* otherwise than as a married woman having separate estate. The only question is, whe-

(a) 6 Q. B. 937.

(b) 1 De G. & S. 560.

(c) 1 Y. & C., Exch., 110.

ther the wife's name should be on the list as well as the husband's.

Mr. Bacon.—That is arranged between the parties, in the event of the husband being on the list.

The VICE-CHANCELLOR:—

I only decide that the husband's name must be there.

Motion refused, with costs(a).

(a) See *Sadler's case*, post, p. 36.

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DAVIDSON'S CASE.

THIS was a motion on behalf of Mr. Alexander Davidson, by way of appeal from the decision of the Master, who had placed the appellant's name upon the list of contributories to the above Company.

The St. Marylebone Joint-stock Banking Company was established in 1836, and commenced business on or about the 5th of September, in that year, and Mr. David Hannay, a shareholder, was appointed manager of the Company.

In October, 1837, Mr. Hannay, who was a friend of the appellant, waited upon him at Ludlow, where the appellant was the manager of the branch there of the Commercial Bank of England, and informed the appellant that he was

The manager of a banking company, in which he held shares, induced a friend D., living in the country, to subscribe the Company's deed for 100 shares, upon the understanding, of which a minute was entered in the Company's books, that all the shares that should not be transferred by him to other

parties, should be transferred for him by the Directors, and that he should receive nothing, nor incur any liability in respect of the shares. After disposing of thirty shares, the purchase-money for which was paid to the Directors, D., in pursuance of the arrangement, transferred the remainder back to the manager, by assigning it to him and his successors in office. He never received or paid anything in respect of the shares, and, eight years after the last transaction, the affairs of the Company were wound up under the Joint-stock Companies Winding-up Act, 1848:—*Held*, that the effect of the transaction was to hold out D. as a partner, to induce others to become members of the Company, and that he was properly placed on the list as a contributory.

Holt's Case 1 Sim. N.S. 390. *Wroth's case* post. 63
Davidson's Case 4 Kay V.S. 694.

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anxious to increase the list of shareholders in the St. Marylebone Joint-stock Banking Company, and that he was then making a tour for that purpose, and expected to induce a good many of his personal friends to join the Company. He asked the appellant, as a favour, to allow 100 shares in the Company to be placed in his name, until such shares could be disposed of and transferred to other persons, stating, that, in the meantime, the shares, though placed in his name, were to be the property of the Company.

The appellant acceded to this request, and Mr. Hannay gave him the following memorandum in his own handwriting:—

“Ludlow, 18th October, 1837.

“Dear Sir,—On the part of the Borough of St. Marylebone Bank I hereby engage to transfer for you at par, 100 shares of stock of that Company held by you, and to keep you out of cash advance, and protect you against all loss by the said Company, until the same is transferred to other parties; and I am,

“Dear Sir, yours sincerely,

“DAVID HANNAY, Manager.”

Upon this memorandum being given to him, and on the above-mentioned arrangement, the appellant executed the deed of settlement of the St. Marylebone Joint-stock Banking Company, and Mr. Hannay delivered to him scrip representing 100 shares. While Mr. Hannay was at Ludlow, the appellant, at his request, signed three transfers for thirty of the 100 shares in his name, upon which occasion Mr. Hannay gave him the following memorandum in his own handwriting:—

“Ludlow, 18th October, 1837.

“Mr. Alexander Davidson has handed me three transfers of shares of St. Marylebone Bank to Messrs. Terry, M'Evily, & Lloyd, in all thirty shares, for which I have to receive on his account 180*l.*, and which sum I will place

to the credit of his cash account credit on stock with the Borough of St. Marylebone Bank, when received.

“DAVID HANNAY, Manager.”

Upon receiving this memorandum, the appellant handed to Mr. Hannay scrip for thirty of the 100 shares. By his affidavit in support of the motion, the appellant deposed, that it never was intended that he should become a shareholder and partner, but that it was agreed that the shares taken by him should be the property of the Company, and that he should have no interest whatever therein, nor be in any way liable for calls or otherwise, or to receive any dividend or interest; and that the transaction with respect to the 100 shares was for the benefit and on the account of the Company.

The arrangement made between the appellant and Mr. Hannay was communicated by the latter to the then directors of the Company, and was ratified and approved, a minute thereof being inserted in the board minute book of the directors, and signed by Col. Stanhope, the chairman, as follows:—

“The manager represented that he had allotted to Mr. Davidson, of the Commercial Bank of England, Ludlow, 100 shares of stock, on the understanding that such shares as he could not transfer there, should be transferred for him at par here, and that he had transferred thirty of the shares, twenty to Mr. Terry, five to Mr. M’Evily, and five to Mr. Lloyd.”

The seventy shares, the residue of the hundred, remained in the appellant’s name until May, 1841, when he received a letter dated 10th of May, 1841, from Mr. Hannay, as follows:—

“Borough of St. Marylebone Bank, London.

“10th May, 1841.

“My dear Sir,—I now inclose a transfer of the seventy shares of stock held by you. When you took them our di-

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rectors undertook to relieve you of them at any time, at par. They have been at a discount for some time, and there is no prospect of an improvement. When you return the transfer, send the scrip certificates also."

The deed of transfer, inclosed with this letter, was in the usual form, except that the assignment was expressed to be to Mr. Hannay and his successors in office, in trust for the directors.

Immediately upon receiving the letter of 10th May, 1841, the appellant executed the transfer, and returned it to Mr. Hannay, with the scrip certificates for the seventy shares, in the following letter:—

" Commercial Bank of England, Manchester,

" 11th May, 1841.

" My dear Sir,—I am favoured with your letter of the 10th instant, inclosing transfer of the seventy shares in your bank, held in my name, to you as manager of the bank, which I now return executed. I also inclose the scrip certificates. This will close the transaction as to these shares; and I shall, therefore, feel obliged by a few lines intimating officially that the matter has been closed accordingly, and the balance standing at my debit wiped off.

" I am, &c.,

" ALEXANDER DAVIDSON."

Mr. Hannay thereupon acknowledged the receipt of the transfer and scrip certificate by the following letter:—

" Borough of St. Marylebone Bank, London,

" 15th May, 1841.

" My dear Sir,—I am duly favoured with your letter of the 11th instant, inclosing transfer of your seventy shares of stock of the St. Marylebone Bank to me as manager, for

behoof of the bank, with the scrip certificates thereof; the balance at your debit in our book is thus extinguished.

"I am, my dear Sir, yours sincerely,
D. HANNAY, Manager."

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The appellant never paid any call or other sum of money upon, and never received any dividends or other sum of money in respect of the shares, nor was his name ever included in any account or return under the 7 Geo. 4, c. 46, as a member of the Company; nor did his name appear in the entry or register of the members of the Company, as filed at the Stamp Office.

The transfer of the seventy shares into the name of Mr. Hannay was among the papers of the Company, and the account in his name in respect of all his shares was balanced and closed, and the transfer of the seventy shares had been entered in the registry book of the Company, and was duly registered at the time. The name of Mr. Hannay, as the transferee, appeared to have been afterwards scraped out, but it did not appear by whom or under what circumstances. The appellant, however, did not in any manner authorise the erasure.

The following were the stipulations of the deed of settlement, which were referred to in the argument.

"1st. That the said several persons and parties hereto of the first part, who are hereinafter distinguished by the title of proprietors, and such other persons as shall become proprietors as hereinafter mentioned, shall, upon their respectively executing these presents, or the supplementary deed thereto, as hereinafter mentioned, be and become proprietors of the Company hereby established, under the regulations hereby contained; and that such proprietors shall be and form a Company, by the name, style, or title of 'The Borough of Saint Marylebone Joint-stock Banking Company.'

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"4th. That the capital or joint stock of the said Company shall be 1,000,000*l.* divided into 40,000 shares of 25*l.* each; but that the said capital may be increased by making additional shares, in such manner and to such extent as hereinafter provided for; and that the shares which, at the date of these presents, have not been taken or subscribed for, and also those which may hereafter be created as hereinafter provided for, shall be allotted and distributed to such persons, and in such manner, as the board of general directors of the said copartnership for the time being shall think advisable.

"13th. That every person in whose name any share or shares in the said copartnership shall be held or stand, shall, to all intents, effects, and purposes whatsoever, be deemed, both at law and in equity, the absolute, sole, and beneficial owner and proprietor thereof, and shall, as such, be the only person known to, or recognised by, the said copartnership, in all votes, transfers, notices, payments, receipts, and other matters relating to the same; and the said copartnership shall not in any case be bound to notice, or be affected by or with express or other notice of any trust, or equitable charge or lien, imposed or intended to be imposed on any such shares or share, or by or with any gift thereof by way of legacy, unless and until the legatee or party who shall claim under or by virtue of any such equitable charge or lien, shall have been duly admitted as a proprietor, as hereinafter mentioned."

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 4th & 7th.

Mr. Bacon and Mr. Little, in support of the motion.—These shares were never the property of the appellant; he was merely a trustee of them for the Company, and, eight years ago, he retransferred them to Mr. Hannay, with the concurrence of the Company. It cannot be held, that, in this state of circumstances, any liability in respect of them can attach to the appellant. [The *Vice-Chancellor*.—Was it suggested before the Master, that the appellant might be

discharged from liability, and that Mr. Hannay and the directors might be liable?] That view was not suggested, because the appellant contended that he had never been liable upon the shares. [The *Vice-Chancellor*.—I suppose his opponents contended that he had held himself out to others as a member of the Company, and could not, therefore, be heard to allege that he was not a partner.] As his name was never returned to the Stamp Office as that of a partner, no one had a right to consider him a member of the Company. Before he executed the Company's deed, he received the undertaking of October, 1837, protecting him from all liability. This engagement between him and Mr. Hannay, the manager, was brought before the directors, and there is a minute of it upon the books, signed by the chairman. After this length of time, the validity of the transaction cannot be disputed by the Company, in whose books the entry is found, and of which the members must be taken to be cognisant. But, if the appellant ever came under any liability, he was exonerated by the deed of transfer, the validity of which has remained unquestioned during eight years. [They cited *Taylor v. Hughes* (a).]

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Mr. Lloyd and Mr. Hetherington, for the official manager, in opposition to the motion.—The first question is, whether either the arrangement, or the transfer on which the appellant relies, was a contract of such a nature, as the directors had power to enter into, on behalf of the Company. Neither of them, according to the rules of the Company's deed, answers this description. The transfer is expressed to be made to Mr. Hannay and his successors in office, in trust for the directors. [The *Vice-Chancellor*.—If those expressions were taken out of the deed, there would perhaps be nothing

(a) 2 Jones & Lat. 24.

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in the case. The assignment seems, in other respects, to be in the form of an ordinary transfer.] The question is, could the appellant have enforced either of the alleged contracts against the Company, or was it within the scope of the authority conferred upon the directors? Another important question is, whether it is not clear that the object of the parties was to induce other persons to become shareholders by holding out the example of the appellant, who, from his situation, must have been supposed to have good opportunities of acquainting himself with the circumstances and prospects of the Company, and of forming a sound opinion upon them. Those who subscribed upon the faith of a representation that the appellant was a shareholder, cannot, when they claim to have his contribution to the losses which have arisen, be answered by referring to a private understanding between the appellant and Mr. Hannay. *Taylor v. Hughes* does not apply, because in that case there had been a real sale and transfer of the shares. On the other hand, the cases of *Preston v. Grand Collier Dock Company* (a) and *Mangles v. Grand Collier Dock Company* (b), are in favour of the respondent.

Mr. Bacon, in reply.—By the 4th clause of the deed of settlement, the directors may deal with the shares as they think fit. They acted upon this clause, and did their best to distribute the undisposed-of shares. Their manager induced the appellant to accede to the arrangement, under which alone he accepted shares. Would any shareholder have objected to such arrangement being entered into? A memorandum of it was entered in the Company's books. It was acted upon by the Company. The Company received the dividends upon the shares, and, when some of the shares were sold, the Company received the purchase-

(a) 11 Sim. 327.

(b) 10 Sim. 519.

money, the appellant receiving nothing whatever. The appellant was treated throughout as an agent to procure shareholders in his own neighbourhood, for the benefit of the Company. He gained nothing, and intended to gain nothing by it. How can it be contended that he is to be exposed to liability? [The *Vice-Chancellor*.—The fact remains that he was, with however fair intentions, a party to a transaction by which the thing that was made to appear was not the thing that was.] The shareholders might have inspected their own minute books if they thought fit. If they did not think fit so to do, but chose to trust to their directors, they must be bound by the exercise of the discretion with which they intrusted their officers. It is not pretended that the appellant intended to deceive any one, nor is there even a suggestion that any one individual has been actually deceived, or induced to take shares, by the notion that the appellant was a shareholder. Not a single instance of that kind is brought forward.

Cur. adv. vult.

The VICE-CHANCELLOR:—

I have considered this case, and particularly the affidavit of Mr. Davidson. From the materials before the Court, it appears to me a just inference that the transaction of 1837, respecting the 100 shares, of which seventy are in question, was devised and carried into effect by the parties to it, for the purpose of enabling or accrediting a fallacious representation that Mr. Davidson had taken, and was the holder of, those shares on his own account, and at his own risk; the object having been (such, at least, is judicially my inference) to induce or encourage, by means of which this was a part, the taking of shares by persons whom Mr. Hannay or the directors might think it advantageous or useful to add to the Company. If this was so, a court of justice, at least, must regard the transaction as unfair, and treat it as one tainted with deceit.

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Mr. Davidson's counsel have argued that it had no other meaning, no other effect, than to constitute him an agent of the Company or the directors, for the disposal of the shares. I cannot accede to the argument. Had the nature or the intention of the transaction been so, it would have been constructed and managed, I think, in a different, a plainer, and a simpler manner. The learned counsel also contended that it was not proved that any person had been in fact misled; but the intention was, in my judgment, to deceive. It has not been proved or alleged that strangers did not, and I think it reasonable to assume that strangers did, become shareholders after the transaction. If they did so, it seems to me likewise right to presume that they became shareholders in the belief that it was truly what it was ostensibly.

Nor do I hold that the case of the shareholders who were so bonâ fide before, and afterwards continued so, is to be disregarded in considering this controversy.

In the circumstances as I view them, the shareholders generally desiring, as I must take it, to hold Mr. Davidson to the seventy shares, as the true proprietor of them, for every purpose, as between him and them, I should certainly, had the transfer and arrangement of 1841 not taken place, have decided in conformity with the Master's conclusion. But do they vary the case? In my opinion not. That business was a mere ceremony consequent on the affair of 1837, or rather, perhaps, a part of it.

I cannot interfere with the Master's decision in this matter; but, though refusing the motion, I do not hold myself bound to do so with costs, especially as I am not satisfied that Mr. Davidson had well considered the transaction before he consented to become a party to it, or that he thought himself acting with impropriety.

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July 5th.

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AND

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MAGUIRE'S CASE.

THIS was a motion on behalf of John Francis Maguire, appealing from the decision of the Master who had placed him on the list, as a contributory in respect of two shares in the above-named Company.

The 17th clause of the Company's deed of constitution gave a general power to the shareholders to alien their shares, and prescribed a form of transfer of the shares to be executed by the transferor and transferee; and the 18th clause provided, that every transfer should be delivered to, and kept by the Company, and a memorial thereof entered in a registry, to be kept for the purpose, and that, until that was done, the purchaser should have no part or share of the profits, nor any interest or vote.

The 30th clause of the deed vested all the power of management in the directors, and also vested the custody of their proceedings and of all the books of the Company in them.

By a regulation of the directors, the proprietors or shareholders were entitled to a free passage in the Company's vessels. The appellant's father, being a shareholder, transferred into the appellant's name two shares, for the purpose of enabling him to make voyages between Dublin and London, in the latter of which places the appellant was keeping his terms, to enable him to be called to the bar.

The owner of several shares in a Steam-packet Company transferred two of them to his son, by a document which was not executed by the son, nor entered in the Company's books, nor otherwise perfected according to the provisions of the deed of constitution. The son was not aware of the transfer. By a rule of the Company, every proprietor was always entitled to a free passage by the Company's vessels, and the son, on several occasions, obtained certificates from the Company's office that he was a proprietor, which entitled him to a free passage; and he also signed each certificate, and the Company's books in respect of these certifi-

cates, as proprietor, and obtained a free passage accordingly, but he never received dividends, nor did any other act as a proprietor:—*Held*, that the son was a contributory in respect of such two shares.

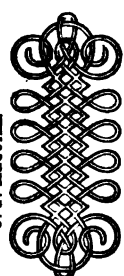
Burns' Case 2 D. F. & L. 295.

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The appellant's name was never returned to the Joint-stock Registry Office as that of a proprietor.

The appellant deposed that he was altogether ignorant of the shares having been transferred into his name, although he had obtained from the office of the Company certificates by means of which he had a free passage in the vessels of the Company.

The certificate for a free passage, which was handed to him on those occasions, and its counterfoil, which was retained by the Company, were in the following form:—

<p>" Proprietor's Ticket. No. 80.</p>	<p>Proprietor's Signature J. F. MAGUIRE</p>		<p>Proprietor's Signature</p>	<p>" St. George's Steam Packet Company. Dublin, 18th April, 1840.</p> <p>B. B. No. _____, Esq., is a Proprietor of the Company, has engaged Cabin Berth, No. _____ in the _____, for _____, intended to sail on _____, 18 _____, at _____ o'clock, and is entitled to a free passage."</p>
<p>Mr. Maguire, of Cork, Cabin Berth, No. _____, in the Mercury, for Cork.</p>				
<p>18th June, 1841.</p>				

The counterfoils were signed by the appellant.

His explanation on his affidavit was to the following effect: "Sometime in the year 1840, the appellant's father informed him that he had made arrangements, by which he could obtain free passages in the Company's vessels between Cork and Bristol, and Dublin and Cork. The appellant accordingly made several voyages between the years 1840 and 1841, in the Company's vessels between those places, and he did not pay any fare for passage on those occasions. He used to go into the office and obtain a free ticket, and he signed a book for each voyage. The appellant was not, however, aware that his father had transferred any shares into his name, and he never inquired into the nature of the arrangements by which he obtained

a free passage. He never authorised his father to accept any shares on his behalf, nor to receive any dividends, nor did his father ever receive any on his account, or as his agent.

The following is a note of the Master's judgment:—

“This application to include J. F. Maguire is founded on the use by him of tickets, giving a free passage in the Company's vessels, called ‘Proprietors’ Tickets.’

“The father of J. F. Maguire, residing at Dublin with his family, was a proprietor of fifteen or sixteen shares. J. F. Maguire, being entered as a member of the Society of Lincoln's Inn, came to London to keep the terms in the years 1841, 1842, and 1843, and made eight voyages from Ireland to England and eight return voyages in the Company's ships. On all these occasions he had Proprietors' Tickets, and thereby had his passage free of expense.

“To prove that J. F. Maguire was a proprietor of shares, the exhibit B. B., called ‘Proprietors’ Ticket,’ is produced. On the counterfoil the title ‘Proprietors’ Ticket’ is printed, on one line are the words ‘Proprietors’ Signature,’ and then follows the signature J. F. Maguire. The ticket states that J. F. Maguire, a proprietor of the Company, has engaged Cabin Berth, No. —, in the [*ship's name*] for &c., and is entitled to a free passage. On this ticket is printed Proprietor's Signature; and on the same line with those words, Mr. Maguire signed his name. The ticket is also signed by the Company's officer.

“These tickets are, I think, *prima facie* proof that J. F. Maguire was a shareholder, and, as such, a contributory. Being such shareholder, the books of the Company are admissible in evidence. I therefore receive the register of shares, and upon that, find he was a holder of two shares. J. F. Maguire deposes that his father transferred these shares into his name without his knowledge, that he was unacquainted with such transfer; but I think he cannot

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avail himself of this ignorance. He signed himself 'Proprietor' on sixteen counterfoils, and took sixteen tickets, in which he is distinctly stated to be a proprietor, and which were all signed by him as a proprietor. Without calling in question J. F. Maguire's veracity, I must in law presume that he had notice of two shares being transferred into his name. I incline to think that the objection to the dividend book 'F' is not good, on the ground that J. F. Maguire must be considered as having notice of shares being transferred into his name, which, I apprehend, fixes him with notice of the mode in which the dividends on the shares had been dealt with; but I consider the facts, independent of the receipt of dividends, sufficient to justify me in including him in the list in respect of these two shares.

"16th June, 1849."

"J. W. FARBER."

Mr. *Jessel* for the motion.—Mr. Maguire ought not to be placed on the list of contributories.

No transfer was ever executed by him, accepting the shares; and if his father executed any transfer, it was never perfected according to the forms required by the Company's deed of constitution. He was therefore, by that deed, expressly excluded from being a partner. [He referred to *Taylor v. Hughes* (a), *Const v. Harris* (b), *Natusch v. Irving* (c), *Angas' case* (d), *Fenwick's case* (e), and *Armstrong's case* (f).]

The books and documents of the Company cannot be used as evidence against Mr. Maguire. It may be true that in an ordinary partnership they might have been so used: that would be so held upon the ground, that, in such a partnership, they are presumed to be within the control of

(a) 2 J. & L. 24.

(b) T. & R. 518.

(c) Gow on Partnership, App. p. 398; and cited in *Coleman v. Eastern Counties Railway Com-*

pany, 10 Beav. 9.

(d) 1 De G. & S. 560.

(e) Id. 557.

(f) Id. 505.

each partner; but in this joint-stock Company the custody of the books is expressly reserved to the directors, which takes this case out of the ordinary rule: *Hill v. Manchester and Salford Waterworks Company* (a).

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The VICE-CHANCELLOR:—

Without any reference to the books, this gentleman is shewn so plainly and distinctly to have represented himself, and to have acted, as a proprietor, that, in my opinion, it is established that he is a proprietor,—and if a proprietor, a partner, and a contributory. Whether the books are to be admitted or not for this purpose under the provisions of the statute, is a question which it is not now necessary to decide.

This character of partner being proved, the books are admissible to shew the number of shares of which this gentleman is to be considered as a proprietor. The books shew the transfer of two shares to him, in respect of which the Master has placed his name on the list. It is contended, and correctly, that various formalities required by the deed were not pursued, and therefore it is argued that this gentleman ought not to be considered as a proprietor. It is, however, impossible for him to be permitted to say that the formalities have not been waived, after all that he has done.

The Master could not properly, I think, have come to any other conclusion than that at which he has arrived.

The motion was refused, with costs.

(a) 2 B. & Ad. 518.

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In the Matter of THE NORTH OF ENGLAND JOINT-STOCK
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AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-
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April 17th &
July 6th.

SADLER'S CASE.

The deed of settlement of a banking Company provided that no shares should be transferred while any call directed to be paid, remained due on them, and that any transfer contrary to the deed should have no validity either at law or in equity. A legatee of shares, on which a call was due, took a transfer of them from the executors by a deed, to which an officer of the Company was a party. The legatee applied for dividends on the shares, but the officer of the Company refused payment until the call was paid up. The legatee never paid the call. She afterwards married, and neither she nor her husband

ever paid or received anything on account of the shares, nor did anything further in respect of them. On the affairs of the Company being wound up nine years afterwards:—*Held*, that the husband was properly placed on the list of contributories; but it was referred back to the Master to consider whether his name ought to be inserted without that of his wife.

(a) The material articles of the deed as to this, are set out in *Armstrong's case*, 1 De G. & S. 566.

Leonard's Case 1 D. F. & S. 532.

gularly returned on that list as the holder of the shares up to April, 1848, when the bank stopped payment. On the 17th December, 1848, the Master, Mr. Farrer, retained the appellant's name on the list of contributories in respect of these shares, describing them as shares to which he was entitled "in right of his wife."

On the 17th April, 1849, upon a motion, by way of appeal from this decision of the Master, an order was made, with consent and without prejudice, that it should be referred back to the Master to review his decision.

On the 27th of April, the Master affirmed his decision, and gave the following reasons in writing:—

" This case now comes before me, upon a reference back to review my decision, for the purpose of adding to the evidence as to one share standing upon evidence distinct from the five, a fact that had escaped the notice of all parties upon the original inquiry. On the part of Mr. Sadler, objection is now made for the first time to the sufficiency or correctness of the notice. The notice is, 'in right of your wife Mary Sadler.' The argument against the notice is, that the notice is in the place of pleadings; and that, inasmuch as the wife would have been joined, if this were an action brought against the husband on a contract made by her *dum sola*, so in the notice the wife must be joined. But although the notice may be in the place of pleadings, yet it does not follow that all the rules of pleadings attach to the notice. The notice, by sect. 78, is to be given to every person included in, or proposed to be specially excluded from, the list of contributories, notifying in what character, for what number of shares, for what amount, or for what other interest such person is included. This information has been given by the notice. Whether or not the wife is to be included also is not material to the husband in the present inquiry; all with which he is now concerned, is the fact that his name is proposed to be included. This

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being my opinion, I must overrule the objection; but if the official manager prefers to give a new notice, I shall let him do so. With regard to the five shares, my opinion is unchanged. I think that the deed of transfer executed by Mrs. Sadler, when Mary Todd, in 1838, and delivered to and received by the Company, is conclusive. It was on her part an assertion of title and claim to these shares, and the Company recognised her title, although they might have rejected the transfer on the ground that there was a call unpaid. (See Deed, 23rd section (a)). Her claim of dividends is itself an assertion of title. The Company refuse to pay the dividends until the call then made is paid, thereby recognising her title; but they do more, they return her name in the return to the Registry Office, and they carry the profits or dividends to her credit in the book kept by the Company of unpaid and unclaimed dividends. By these acts, the parties respectively renounced or waived the requisitions or terms of the deed; if they could not do so, then the executors who transferred to Mary Todd, in 1838, continue liable to the call.

"25th April, 1849.

"J. W. F."

On the 12th June, 1849, the Master gave the following additional judgment:—

"Review of the decision which I had come to, as stated in my note of the 25th April, 1849, in consequence of the judgment of the Court of Exchequer in *Ness v. Angas* and *Ness v. Armstrong* (b).

These cases proceed on the ground that the remedy by scire facias is given only against members for the time

(a) See post, p. 41.

(b) The judgment of the Court of Exchequer in the case of *Ness v. Armstrong* was delivered on the 30th of May, 1849. The reporters have been favoured with the following note of the judgment in

that case, which they subjoin. It shortly states the grounds of the decision in *Ness v. Angas*, which had been decided on the 8th of May, 1849.

Pollock, C. B.—This was a scire facias against the defendant, who

being, and that the plaintiffs having voluntarily resorted to a peculiar statutory remedy, must adhere closely to the

was a member of the North of England Joint-stock Banking Company, to recover the amount of a large sum of money, for which the plaintiff had obtained a judgment against the public officer.

The plaintiff, by his writ of *scire facias*, alleges that the defendant, at the time of issuing of the writ, was a member of the Company. This allegation was traversed by the plea, and on that traverse issue was joined. It appeared on a trial before my Brother *Cresswell*, at the last Summer Assizes in Northumberland, that the defendant was executor, and had proved the will of one Hedley, who, at his decease in May, 1844, was a duly registered shareholder in the Company. The defendant, since the testator's death, had received dividends, or, at all events, one dividend in respect of the testator's share, but he had done no other act to make himself a shareholder. In the Stamp Office Return of 1845, Hedley's shares are described as belonging to Hedley's executors. The deed of settlement of the Company was in evidence, and by the 28th clause, it is provided that the husband of any female shareholder, or the executor of any deceased shareholder, should not be a member of the Company in respect of such shares, that he should be at liberty to sell the shares, or, at his option, become a member, on complying with the provisions therein contained.

[Here his Lordship read clauses 29, 30, and 31, of the deed of set-

tlement, which specify the formalities required to constitute shareholders.]

In the case of *Ness v. Angus*, which was argued last Term before my Brother *Rolfe*, and Brother *Platt*, and myself, we had occasion to consider a question nearly the same as that arising upon the present case. There the defendant was not an executor of a deceased shareholder, but the husband of a female shareholder; and we decided that he was not liable, upon the principle, that, as he had not taken the steps, which, by the clause to which we have referred, were necessary to make him a member as between himself and the other shareholders, he was not a member for the time being within the true intent and meaning of the 7 Geo. 4, c. 46, s. 13. We thought that the statutory execution there given was applicable only to those who were actually shareholders, entitled, as against the other shareholders, to the rights of partners *inter se*. On the argument of the present case, an endeavour was made to distinguish it from *Ness v. Angus*, on the ground, that there was evidence from which it might be inferred that the defendant had done all that the deed required, in order to entitle him, as executor, to become a member; that is, that he had given the required notice in writing, and caused the shares to be transferred into his name, and had, if so required, executed the deed of settlement, in-

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terms of the statute; but the proceeding under the Joint-stock Companies Winding-up Act is widely different. It is compulsory now on the Company to resort to this mode of enforcing calls, and, moreover, the list is to consist not only of members, but of every other person liable to contribute. If Sadler is liable to contribute, he must be included in the list. *Reavley's case* (a) established, that a father, covenanting to pay calls during his son's minority, was properly included in the list. In the present case, Mary the wife, when Mary Todd, covenanted to pay calls then due, and to accrue due. It is argued that the deed of transfer was altogether a nullity, because it was executed at a time when a call was due; but it seems to me, that the clause of the deed of settlement, upon which the argument is founded, is a clause intended for the benefit

asmuch as the defendant in this case certainly received the dividends which accrued due after the testator's decease, and which he was not entitled to receive unless he had previously become a member. It is impossible to say that there was not some evidence that he had become a member. But, on the argument before us, we intimated our opinion, that, when my Brother *Cresswell* reserved leave to enter a nonsuit, he could not have intended the plaintiff should have the benefit of any such point as that made by Mr. *Knowles*, and which Mr. *Watson* contended was not a point raised at the trial at all. We have consulted my Brother *Cresswell*, and he informed us, that, though it was certainly understood the plaintiff was to have the benefit on the motion for the nonsuit, of the fact, that the executor received the dividends which accrued after the

testator's death, yet that was to be coupled with the fact, that he had not otherwise caused himself to be made a member. This excludes the notion of any inference to be deduced from the receipt of the dividends beyond the bare fact of the receipt itself; and this being so, the case is undistinguishable from *Ness v. Angas*, decided immediately before the discussion of the present case, and there we held, that the husband of a female shareholder who had not made himself a member by complying with the provisions of the deed, was not liable to execution under the 7 Geo. 4, c. 46, s. 13, as a member for the time being; and the same principle precisely applies to the case of an executor of a deceased shareholder. The rule for a nonsuit must therefore be made absolute.

(a) 1 De G. & S. 550.

of the Company, and one which the directors had authority to waive, especially when the waiver was accompanied by an express covenant by the transferee to pay calls due. *Shaw v. Rowley* (a) shews, that where a public Act forbids the transfer of shares until the shareholder shall have paid the calls due, yet the transfer, as between the transferror and transferee, is binding, although such calls be not paid. My opinion is, that Mary Todd bound herself expressly to pay calls due and to become due by the covenant in the deed of transfer which she executed, and that her husband must be included in the list in respect of the five original shares.

“ 12th June, 1849.

“ J. W. F.”

In addition to the clauses of the deed of settlement, which are set out in *Armstrong's case* (b), the following were referred to in the argument:—

No. 23. No share or shares shall be transferred after the time appointed for the payment of any instalment called for by the directors, until the amount of such instalment, in respect of the same shares, with interest, as aforesaid, shall have been paid.

No. 24. The directors shall have power from time to time to make such regulations respecting the form, preparation, custody, and registration of the instrument of transfer of shares as shall appear to them expedient; and all sales and transfers of any shares not made conformably to the provisions of the deed of settlement, and according to the regulations of the directors, shall be invalid at law and in equity.

Mr. Russell and Mr. Manisty, for the appellant.—The transfer to Miss Todd was a mere nullity, as under the 23rd and 24th articles of the deed of settlement no valid transfer

(a) 16 M. & W. 810.

(b) 1 De G. & S. 566.

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of the shares could be made, until the amount of the instalment and interest was paid. There is no power given to any one to dispense with these provisions without the consent of all the shareholders, and the Company refused to recognise Miss Todd as a shareholder, by refusing to pay her any dividends. *Ness v. Armstrong* shews that a person so situated is not even liable to the creditors of the concern. That case decides that such a person is not a partner or contributory; because any partner or person liable to contribute must necessarily be liable to creditors, although the converse of the proposition is not true, the claim of a partner being not co-extensive with that of a creditor, but being liable to be controlled or abridged by agreements between individuals who may apparently be members of the same partnership. During nine years all parties have acquiesced in Mrs. Sadler being treated as having no interest or liability with reference to the Company. She has never enjoyed one privilege or benefit as a shareholder. While the bank prospered they repudiated her as a shareholder, they cannot now be permitted to make her husband liable for their debts. With regard to him personally, he has not done a single act to take upon himself the character of a member of the Company. The insertion of his name, without that of his wife, must, at all events, be wrong, and he is entitled to have it removed on that ground.

Mr. Bacon and Mr. Headlam, for the official manager, were stopped by the Court.

The VICE-CHANCELLOR:—

Upon the material part of the case I entertain no doubt. I think it plain that the name of Mr. Sadler must remain upon the list. The question is, whether his name alone, with the notice that he is entitled in right of his wife, sufficiently describes his position. My impression is, that, though it may be reasonably contended that the true state

of things is sufficiently described by the mode in which Mr. Sadler's name is inserted, yet in strict propriety the wife's name should be there associated with his(a), as in an action, so that, if she should survive, the liability might survive also. I cannot consider her as being before the Court on this occasion, and, therefore, I cannot put her name on the list. Mr. Sadler's name, however, must remain, and he must pay the costs of the motion to this time, and I will refer it to the Master to review his certificate, so far as relates to the absence of Mrs. Sadler's name from the list, with liberty to the official manager to serve such notice upon Mrs. Sadler, as he may be advised.

(a) See *Burlinson's case*, ante, p. 18.

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WAY COMPANY;

AND

IN the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACTS, 1848 & 1849.

PARBURY'S CASE.

August 3rd.

IN the beginning of the year 1845 a scheme was set on foot for forming a railway direct from London to Exeter, and in the month of May, in that year, was provisionally registered under the name of "The Direct London and Exeter Railway Company" (with extension to Falmouth and Penzance).

A prospectus was issued inviting the public to take shares in the projected undertaking, in which it was stated that the capital was to be 3,000,000*l.* in 120,000 shares of 25*l.* each, the deposit on which, to be immediately payable, was 1*l.* 7*s.* 6*d.* per share. The prospectus contained various statements and representations which were now alleged to be fraudulent and delusive, but which are not material to

It is not sufficient ground for excluding an allottee from the list of contributors to a provisionally registered Railway Company, that the prospectus of the Company contained incorrect and fraudulent statements, in reliance on which he applied for shares, or that the project was never carried into effect, unless it appear that the only other

persons interested in the Company were the persons who made the fraudulent statements.

*Autton v Thompson 3 N.D. Ca. 176. Bell's Case 22 Beav. 39.
Nicol's Case 3 Def. & J. 423. Blackburn's Case 3 S. M. 89. 181.*

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be set forth, as the decision did not turn upon them, but assumed the truth of the allegation against their accuracy.

Mr. George Parbury made the following application for shares in the projected undertaking:—

“July 24th, 1845.

“To the Provisional Committee of Arrangement of The Direct London and Exeter Railway Company.

“Gentlemen,

“I request you will allot me 100 shares of 25*l.* each in the above railway, and I undertake to accept the same, or such less number as you may appropriate to me, subject to the regulations of the Company; also to sign the necessary legal documents; and to pay, when required, the deposit thereon of 1*l.* 7*s.* 6*d.* per share.

“GEO. PARBURY.”

Mr. Parbury received in reply the following Letter of Allotment of 100 shares:—

“Not transferable.

“The Direct London and Exeter Railway Company with extension to Falmouth and Penzance.

“Provisionally registered; Capital, 3,000,000*l.* in 120,000 Shares of 25*l.* each: Deposit, 1*l.* 7*s.* 6*d.* per Share.

“No. of Letter, P. 3—Deposit, 137*l.* 10*s.*

“No. of Shares, 100.

“6, Great Winchester-street, Broad-street, London.

“11th October, 1845.

“Sir,

“The Committee have at your request allotted you 100 shares of 25*l.* each in this undertaking, upon condition that the deposit of 1*l.* 7*s.* 6*d.* per share thereon be paid on or

before Saturday, the 18th day of October inst., in default of which this allotment will be forfeited and the shares disposed of to other applicants. The bankers will give a receipt for the deposit in exchange for this letter, which must be left with them. I beg also to inform you that scrip for the shares will be delivered to you in exchange for the bankers' receipt upon your executing the Parliamentary contract and subscribers' agreement, of which due notice will be given. Be pleased to observe that the bankers' receipt must be produced when you attend to execute the deeds.

"I am, sir,

"Your obedient servant,

"E. S. BLUNDELL, *Hon. Sec.*"

The Committee of Management caused the following advertisement to be inserted in the *Times* newspaper of the 15th and 17th October, 1845:—

"The Direct London and Exeter Railway.

"The Committee of Management of this Company hereby give notice that the allotment of shares is completed, and that letters will be issued to the public, if possible, this day, October 13th, 1845.

"E. S. BLUNDELL, *Hon. Sec.*

"The Committee of Management are happy to announce that the surveys are being carried on with the utmost activity under Mr. Braithwaite and his assistant engineer; and that they have no doubt of being able to comply with the Standing Orders even before the time fixed by Parliament. The second deposit of 5*l.* required by the House of Commons need not be called for under the Standing Order of the House of Lords until the bill shall have passed the House of Commons.

"By order of the Committee,

"E. S. BLUNDELL, *Hon. Sec.*

"October 13th, 1845."

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The Committee of Management also caused the following advertisement to be inserted in the *Times* newspaper, on the 17th of October, 1845:—

“The Direct London and Exeter Railway, with Extension to Falmouth and Penzance.

“The Committee of Management hereby give notice that they have completed the allotment of shares, and that the usual letters are this day issued. In the arduous duty of deciding on claims, unprecedented it is believed in their number and respectability, the Committee have been obliged to give a preference to applicants locally interested or likely to bring to bear for the Company a large share of legitimate influence. The numerous persons with undoubted claims on the score of wealth and social standing, whose applications have either been passed over or put down, are requested to accept this reason as the Committee's apology. The Committee desire to add, that while attestations of public support are daily reaching them from the most influential quarters, the engineering preparations, under Mr. Braithwaite, are so far advanced that the project cannot fail to be placed before Parliament in a manner the most satisfactory to the shareholders.

“E. S. BLUNDELL, *Hon. Sec.*”

On the 18th October, 1845, Mr. Parbury paid 137*l* 10*s*., the amount of deposit on the 100 shares allotted to him, to the bankers of the Company; and received in exchange the following bankers' receipt:—

“18th day of October, 1845.

“Received, on account of the Provisional Committee of the Direct London and Exeter Railway, with extension to Falmouth and Penzance, the sum of 137*l* 10*s* 6*d*.

“For CURRIES & Co.,

“J. HUITSON.”

"N. B.—On the deeds being signed at the office in London, (previous to the 1st November,) the scrip certificates will be given in exchange, after which period the deeds will be forwarded to the country and must then be signed. Due notice of the time and place where the deeds will lie will be given in the London and Country Journals. Upon the execution of the Parliamentary contract and subscribers' agreement, scrip certificates will be given in exchange for this receipt."

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Mr. Parbury never signed the subscribers' agreement or Parliamentary contract.

Although applications were made for upwards of 400,000 shares, not more than 60,000 shares were allotted; and not more than 23,495 were paid upon.

The total capital ever received by the Company amounted to no more than 33,000*l*.

Out of the sixty-two persons whose names appeared in the Company's prospectus as forming the provisional committee, there were two at least in regard to whom there was no evidence whatever that they sanctioned their names being placed on the list of provisional committeemen.

The project was entirely abandoned in the end of the year 1845, or soon after that year, and no money was ever returned to the shareholders.

Under the usual order for winding up the affairs of the Company, the Master retained the name of Mr. Parbury as a contributory for 100 shares.

Mr. *W. M. James*, in support of a motion on behalf of Mr. Parbury, by way of appeal from the Master's decision, to have his name removed from the list.—No such Company as that of which Mr. Parbury engaged to become a member was ever formed. The project altogether failed; and it is not reasonable that he should be

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made a contributory to costs and expenses incurred by persons who had no authority for the purpose, and who had fraudulently deceived him. This case is merely that several persons combined and deceived an innocent individual; they then incurred liabilities, to which no assent on his part is proved, or can be assumed to have been given, because the objects for which Mr. Parbury assented to join were never attempted to be carried into effect. Mr. Parbury is so far from being bound by the acts of the provisional committee, that he is entitled at law to recover back from any of them the money fraudulently obtained from him: *Wentner v. Shairp* (a), *Walstab v. Spottiswoode* (b), *Bell v. Lord Mexborough* (c). It may be said that the advertisements were published after the date of the allotment of shares; but the prospectus itself contains sufficient misrepresentation to justify Mr. Parbury's claim to be struck out of the list of contributories.

Mr. *Swanston* and Mr. *W. T. S. Daniel*, for the official manager, were not called on.

The VICE-CHANCELLOR:—

If one person induce another to enter into a contract with a third by fraudulent representations, the deceived person may be entitled to recover damages for the fraud against him who practised it; but is the contract therefore void?

If in this Company there are, besides Mr. Parbury, persons in a situation similar to his, and equally innocent with him, he is liable to contribute equally with them.

It seems to be a just inference that there were various persons in the same situation with Mr. Parbury, and as innocent as himself, and I cannot hold that he is not a contributory.

(a) 4 Railw. Cas. 542.

(b) 15 M. & W. 501.

(c) 5 Railw. Cas. 149.

If it were established, that the only other persons interested in these affairs were the persons who made the alleged misrepresentations, the case might be different; but whatever this gentleman's remedies may be against any other persons, I cannot say that he is not properly on this list.

The motion was refused, without costs.

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On this day the VICE-CHANCELLOR said, that, since giving the foregoing judgment, he had received the second number of Messrs. Hall & Twells' Reports, and had read the judgment of the *Lord Chancellor* in *Ex parte Morgan, In the Matter of the Vale of Neath Brewery* (a). His Honor read some of the principal passages in that judgment (b), and said, that although the cases specifically differed very much from one another, yet some of the observations which the *Lord Chancellor* was reported to have made were by no means inapplicable to the case before his Honor.

August 4th.

(a) 1 Hall & T. 320.

(b) See Ante, Vol. 1, p. 774.

In the Matter of THE UNIVERSAL SALVAGE COMPANY;

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Dec. 19th.

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848.

SHARPUS'S CASE.

THIS was a motion on behalf of the official manager of the above Company, by way of appeal from the exclusion

An allottee,
who had paid
his deposit on
shares in a

Company which was afterwards completely registered, claimed to be excluded from the list of contributories, under the Joint-stock Companies Winding-up Act, 1848, on the ground that a condition expressed on the scrip certificate, that the capital should be 10,000*l.* in 4000 shares had not been fulfilled, and that 2600 shares only had been subscribed for:—*Held*, that this was not sufficient ground for his exclusion.

On an appeal from the Master as to the insertion of a name on the list of contributories, it must be assumed that the Company is within the Winding-up Act.

The proper mode of disputing that proposition is by an application to discharge the order for winding up the Company.

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of the respondent, Mr. Thomas Sharpus, from the list of contributories.

According to the evidence on behalf of the respondent, who was examined on his own behalf in the Master's office, the respondent requested a friend to ascertain whether the deed of settlement of the Company, which was then only provisionally registered, would contain a clause making the shareholders only liable for the amount of their share or shares. The respondent's friend said he would speak to Mr. Warren, a gentleman in the office, and who was afterwards secretary. The respondent received no communication from Mr. Warren, but his friend received the following letter from that gentleman, which he handed to the respondent:—

“ 6th of May, 1845.

“ My dear Friend,—In answer to your letter communicating the wish of Mr. Sharpus to take four shares in the Universal Salvage Company, provided there is the usual clause, ‘shareholders only liable for the amount of share or shares,’ I beg to say, that such a clause will be inserted in the deed of the constitution of the Company; besides which, there is a special clause restraining the directors from embarking in any one operation (as may be seen by the prospectus) until they have funds more than sufficient by one-third of the amount to cover the expenses; and, every director being of necessity a shareholder of not less than ten shares, will of course be a tolerable guarantee that they will look very closely into, not only the public, but what really is their own interest. Added to this, there are excellent trustees who have accepted that office, whose duty it will be to see that the interests of the Company are protected. Should Mr. Sharpus determine upon taking the four shares, he will have the kindness to write in for them, directed to the secretary, Mr. Walter Raymond, or myself, and immediate attention will be paid; or if he would prefer coming down to Chambers, every information will be given him.”

Mr. Warren was a clerk in the office at that time; and the respondent deposed, that, in consequence of the above letter, he wrote for and obtained a prospectus; and, being satisfied by Mr. Warren's letter, and the prospectus taken together, he applied for shares by signing and sending the following letter to the secretary:—

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" May 9th, 1845.

" Sir,—I desire to take six shares of 25*l*. each in the Universal Salvage Company; and I agree, upon the same being made out to me, to pay the sum of 5*l*. deposit on each share, and thenceforth to hold the same upon the conditions indorsed on such shares, and for the purposes of the prospectus issued by the Universal Salvage Company, bearing date October, 1844."

The shares were allotted to him, and scrip certificates sent to and received by him, in the following form:—

" The Universal Salvage Company.

" Registered according to Act of Parliament, 7 & 8 Vict.
c. 110.

" Capital 100,000*l*. in 4000 Shares of 25*l*. each; Deposit
5*l*. per Share.

" Certificate for one Share, No. ———.

" This is to certify, that the holder of — is the proprietor of one share in the Universal Salvage Company, and is entitled to all benefits and advantages of the same, subject to the conditions printed on the back hereof, and to the other regulations of the Company. London, dated the 30th day of June, 1845.

" Entered, Vol. 2,
page 27.
" T. R. W., June
30, 1845.

" SAMUEL PRICE,
" E. G. WINTHROP, } *Directors.*
" R. W. WOOD.

" WALTER RAYMOND, *Secretary.*"

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Conditions.

- " No. 1. The capital shall be 100,000*l*., in 4000 shares of 25*l*. each, and the deposit 5*l*. per share; out of which capital the directors shall purchase the interest of the Great Salvage Company in all or any of the patents now in their possession, or any licence to use the same.
- " No. 2. No call hereafter shall exceed 2*l*. 10*s*. per share, being a moiety of the deposit.
- " No. 3. In case of further calls being made and not paid within thirty days after the day fixed for payment, the shares so omitted to be paid upon, together with all payments already made thereon, will be forfeited, such forfeiture to be for the general benefit of the remaining shareholders.
- " No. 4. The affairs of the Company shall be under the entire management of a board of directors, who shall have power to make the necessary rules and regulations for conducting the business of the Company in all its branches. The present board of directors to continue in office until the annual general meeting for the year 1850, and in the meantime to be empowered to elect other persons to make up a full board, and to fill up vacancies.
- " No. 5. The directors shall have the power to declare dividends, and direct the time and manner of paying them.
- " No. 6. There shall be two half-yearly meetings of the shareholders, of which fourteen days' previous notice will be given in the leading morning journals of London.
- " No. 7. This certificate is provisional, and must be exchanged hereafter for another of the same amount, which will be under the corporate seal of the Company, of which public notice will be given."

The respondent paid the deposit, but never signed any deed, nor took any part in the affairs of the Company; nor had he paid a call which had been made.

It appeared that some of the terms specified on the scrip certificates and prospectus had not been complied with on the part of the Company; and, particularly, that, instead of 4000 shares, only 2600 were taken.

A deed of settlement, dated 18th August, 1845, was executed by various shareholders; and, in January, 1846, the Company was completely registered, under the 7 & 8 Vict. c. 110.

The Master gave the following judgment:—

“Upon looking through the evidence, I do not find any act of Mr. Sharpus towards the Company which amounts to a waiver of his right to insist that the conditions of the provisional shares were not fulfilled. It seems to me to fall within the principles of Lord *Mansfield's case* (a). To be excluded.—J. W. F. 19th April, 1849.”

Mr. Russell and Mr. H. Prendergast, in support of the motion.—The ground upon which the Master appears to have decided was, that some misrepresentation was made to the respondent. But if any person has induced the respondent to incur liability by means of a misrepresentation, the appellant has his remedy against that person, and cannot, on that account, be relieved from the position in which he is placed as a member of an association which comes within the provisions of the Winding-up Act. There is no pretence for saying there was any fraud or misconduct on the part of the directors.

The VICE-CHANCELLOR.—Was the Master's ground, that there was no contract?

(a) See next case, which, although heard before this in the Master's office, came on upon the appeal after it.

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Mr. Bacon.—Yes: that there was no contract of partnership.

The VICE-CHANCELLOR.—Is the contention that the association is not within the Act?

Mr. Bacon.—I should have doubted whether it was within the Act.

The VICE-CHANCELLOR.—If you mean to contend that it is not within the Act, I can hear you on a motion to discharge the order. I am afraid that, for the purposes of the present motion, you must assume it to be an association within the Act.

Mr. Russell and Mr. H. Prendergast.—The only misrepresentation alleged to have been made is a statement by one of the clerks of the Company to a friend, that a clause would be introduced into the deed protecting the subscribers from liability. The alleged misrepresentation is not traced or ascribed to any one having authority to make it on behalf of the Company or its officers, and in itself was nugatory, as it was clear that no such clause could be effectually framed; and that, if such a proviso had been introduced into the deed, it would have been merely void. [The Vice-Chancellor.—If it is assumed that this association is within the Act, on what ground is the respondent to be excluded?] [Mr. Bacon.—The terms on which he agreed to become a subscriber have never been fulfilled, for the amount of capital to be subscribed was a condition precedent to the formation of the association.] Our answer to that is, that there is nothing in the 7 & 8 Vict. c. 110, to make any such condition requisite to the formation of a Company under its provisions. According to the terms of the 7th section of that statute, a Company may be completely registered as soon as its deed is signed by one-fourth

in number of the subscribers, provided they hold one-fourth of the maximum number of shares in the capital. [The *Vice-Chancellor*.—My difficulty is this, whether the ground alleged for removing the respondent from the list does not involve the question as to the propriety of the order for winding up the Company.] It annihilates the Company, and assumes that there is none. [The *Vice-Chancellor*.—The words of the Act are, “company, association, or partnership,” implying, perhaps, that there may be associations within the Act which are not partnerships nor companies.] The case of the *Direct Eas-ter Railway Company*, which your Honor has just heard, is an instance. The respondent, having received the shares, never repudiated them, nor offered to return the scrip certificates. He did no act to lead any one to suppose that he did not mean to take any benefit which might have arisen from the shares.

It is difficult to understand the principle on which it can be contended that no association existed until the whole 4000 shares had been taken. Such a proposition would render the Registration Act a dead letter; for of all the associations to which that Act has been held to extend, including those to which the provisions of the Winding-up Act have been applied, before the very Master from whose decision we are appealing, probably not one fulfilled the condition of having all its shares subscribed for. It would be most anomalous to say, this is merely a conditional association, subject to be made by some future event, which is to operate by way of relation, an actual partnership from its commencement. The association must be held to exist, at all events as soon as the proportion of shares prescribed by the Registration Act are taken; for that Act then authorises the commencement of operations, which necessarily imply the existence of a partnership; and any terms set out in the prospectus and the scrip certificates must be taken in connexion with the Act, by

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which the powers and liabilities of such bodies as this are regulated.

Mr. Bacon and *Mr. O. W. Farrer*, for the official manager.—
 The respondent applied for shares upon certain conditions, one of which was, that a certain amount of capital was to be raised. That condition was never fulfilled. He never agreed to be a partner in a Company with 2600 shares. This is sufficient to exclude him. *Fox v. Clifton* (a) establishes, that if the advertised capital is not subscribed, the scheme has failed, and there is no contract by which any person taking shares would be bound. *Pitchford v. Davis* (b) is another authority to the same effect. The respondent has a right to recover back his deposit: *Wontner v. Shairp* (c). [The *Vice-Chancellor*.—Suppose A. and B. to be partners, and A., by a fraudulent representation, to induce C. to join the concern, B. having nothing to do with the matter, and a partnership to be formed between the three, can C. say to B. that the two are not partners, on account of A.'s fraud?] That is not, we submit, the case before the Court. The representation was, that a partnership was to be formed of an indefinite number of persons, but with a definite capital. If A. agrees to be a partner with B. and C., and 30,000*l.* capital, to be subscribed equally, and C. never joins, A. could not say that B. was his partner, without C. [The *Vice-Chancellor*.—But suppose a great expense to be incurred in endeavouring to find C., must not A. and B. contribute to that?] If a stipulation to that effect were part of the contract. If not, the expense must fall on him who incurs it. Here there was only a conditional contract in the event of the partnership being constituted according to the terms held out by the scrip certificates: *Nockels v. Crosby* (d). The Company

(a) 6 Bing. 776.

(b) 5 M. & W. 2.

(c) 4 Railw. Cas. 542.

(d) 3 B. & C. 814.

never having been formed, no liability can have been contracted rendering contribution necessary or proper. If any expense has been incurred, it must fall upon the individuals who incurred it; for the contract between the parties is this, if it were plainly expressed: "We shall not become liable unless this first condition, that there is sufficient capital subscribed, shall be complied with and carried into full effect." Some persons may have incurred expense; the law gives them a remedy if they have any title to it. If they have assisted in getting up this Company, they may be without a remedy. They may have said, as they probably did, "We will run the risk of there being the whole amount subscribed. We know what the consequences are, because the case of *Nockels v. Crosby* (a) has decided, that if we fail to get the full amount subscribed, every man whose money we have, may call upon us for it." They knew that it had been decided, that if they did not succeed in getting the full number of subscribers, they ran the risk of paying back the money they had taken, upon the supposition that there would be a sufficient number of shareholders. The Court, however, now has not to consider any such question as that. The question is simply upon this Act of Parliament, whether certain parties were responsible for the losses of the Company. It is clearly decided that they are not responsible or liable for any loss; and, therefore, any contribution from them is wholly unnecessary. There is nothing for which they can by any possibility be liable, and for that reason they ought not to be retained on the list. This gentleman can establish no claim to the assets. His right, if he has any, is to have his money paid back to him. He does not desire that, upon the present occasion. Another objection to his being on the list arises from the forfeiture of shares. That objection is only introduced in

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(a) 3 B. & C. 814.

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this way:—There is among the conditions on the scrip certificate one which would empower the directors to declare the shares forfeited; and as some time had elapsed, it would not be unreasonable that a man, thinking better of it, and being content to lose his money, or resolved not to go on with the Company, should forbear to comply with the requisitions, and that he should conclude that the directors had taken him at his word, and forfeited his shares.

The VICE-CHANCELLOR:—

Assuming the validity of the order under which the Master proceeded, I think, with deference to him, that the materials appearing are not sufficient to support the exclusion of the name of this gentleman from the list. I shall, therefore, request the Master to review his report.

Dec. 19th. It was stated, on this day, that the Master had reconsidered his judgment, and had decided, that, having regard to the 7 & 8 Vict. c. 110, s. 25, Mr. Sharpus's name ought to be upon the list.

*August 3rd
 & 4th.
 Dec. 19th.
 See marginal
 note to preced-
 ing case.*

THE EARL OF MANSFIELD'S CASE.

THIS case was in its circumstances similar to the preceding, with the exceptions, that, on the one hand, the respondent, the Earl of Mansfield, had signed no letter of application for shares, the application having been made verbally through his brother, Mr. Murray; and that, on the other hand, no charge of misrepresentation was made on his behalf beyond the nonfulfilment of the conditions of the prospectus and the scrip certificates. Lord Mansfield had acknowledged the receipt of the certificates by the following letter:—"I beg to acknowledge the receipt of twenty provisional shares in the Universal Salvage Company."

Blackburn's Case 8 N. H. 180.

The following were the reasons given by the Master for excluding the Earl of Mansfield:—

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“Lord Mansfield applied for provisional shares through Mr. Murray, and on the 30th of June, 1845, by a note to the secretary, acknowledged the receipt of ten shares: this was before the date of the deed of settlement (18th August, 1845) and certificate of complete registration.

“Lord Mansfield paid the deposit of 5*l*. per share before August, 1845. He has done no other act whatever.

“In July, 1846, a call was made; but Lord Mansfield did not pay it or pay regard to it.

“Under these circumstances, into what contract did Lord Mansfield enter, if into any? For an answer, look into the conditions on the back of the provisional certificate. The first of these is, that the capital shall be 100,000*l*. in 4000 shares. The capital really subscribed is only a fraction of that sum. This condition precedent, on which Lord Mansfield was to join the Company, has never been performed. That this is the true construction of such a condition has been repeatedly held, both as between creditors seeking to fix persons as partners: *Fox v. Clifton* (a), *Pitchford v. Davis* (b), with the cases there referred to; and as between subscribers themselves: *Nockels v. Crosby* (c), *Walstab v. Spottiswoods* (d), *Wontner v. Shairp* (e). But further, the 3rd condition provides, that, in case of calls being made and not paid within thirty days after the day fixed for payment, the shares, with all payments already made thereon, will be forfeited.

“It is the fair construction of this condition; and Lord Mansfield had good ground for supposing, that, by refusing for thirty days the payment of the call, all his interest in

(a) 6 Bing. 776.

(b) 5 M. & W. 2.

(c) 3 B. & C. 814.

(d) 15 M. & W. 501.

(e) 4 Railw. Cas. 542.

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the concern would ipso facto cease. Such a condition was relied on in *Fox v. Clifton* (a).

"I propose, therefore, to exclude Lord Mansfield from the list.

"1st March, 1849.

"J. W. F."

The Master afterwards gave the following further opinion:—

"Since I wrote my opinion of the 1st of March, I have reconsidered it, especially with reference to the question whether the 7 & 8 Vict. c. 110, and 11 & 12 Vict. c. 45, have produced upon the law, as established by the cases I have referred to, any change. The argument is, that Lord Mansfield, being a subscriber, is, under the 7 & 8 Vict. c. 110, s. 3, a person who has agreed in writing to take shares, and, consequently, is a person entitled to profits; that, by the 11 & 12 Vict. c. 45, s. 3, a member is defined to be any person entitled to a share of the assets or accruing profits of any such Company at the time of presenting the petition for dissolving, &c.; that the word 'contributory' includes every member of a Company, and that therefore Lord Mansfield is a contributory.

"If this argument is sound, Lord Mansfield, and every subscriber or person who has agreed to take provisional shares, or has taken provisional shares, is converted into a holder of shares, free from the conditions upon which he took the provisional shares, and is constituted an absolute shareholder or partner as much as if he had signed the deed.

"The 7 & 8 Vict. c. 110, is so loosely drawn that there is room for much argument in support of this view of it; but I have come to the conclusion that it cannot bear the construction so attempted to be put upon it.

(a) Judgment of *Tindal*, C. J., 6 Bing. 798.

“ It would work so great a change in the law,—taking away the locus poenitentiae from subscribers, fixing them as members, without the power of further inquiry and deliberation, and without the power of throwing up provisional shares,—that the legislature must have expressed itself more clearly, if it had been so intended.

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“ Suppose, in this particular case, Lord Mansfield had gone to the office of the Company, after complete registration, and inquired what was the number of shares taken, what amount of deposits paid, and found that 2000 or more out of 4000 shares remained unallotted, Lord Mansfield would justly have said, ‘ This is not such a Company as I agreed to belong to; I never agreed to take shares in such a Company.’ It would be manifest injustice to answer, ‘ You cannot abandon the Company,—you are fixed by legislative enactment, whatever was the original agreement you entered into. Though you agreed to become a member on certain conditions, yet you are now a member, though those conditions are unfulfilled.’ I think that, before Lord Mansfield could become a member, it was necessary for him to elect to become one; the cases shew that slight acts would amount to such election.

“ Lord Mansfield has made no election; he insists that he has not become a member,—he has a right so to insist,—therefore I cannot include him in the list.

“ Suppose Lord Mansfield had been sued for the call, he might have pleaded that the Company suing was not the Company which he agreed to join and become a member of. I again refer to *Walstab v. Spottiswoode*, also *Wontner v. Shairp*, following it, as authorities by which this case is governed.

“ 22nd of March, 1849.”

Mr. Russell and Mr. H. Prendergast appeared in support of the appeal of the official manager. August 3rd.

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Nov. 19th.

Mr. *Malins* and Mr. *Glass*, for the Earl of Mansfield.

It was arranged that the motion should stand over till the result of the reference back to the Master in *Sharpus's* case was known.

Mr. *Russell* and Mr. *H. Prendergast*, on this day, stated that the Master had, on consideration, reversed his former decision in *Sharpus's* case.

The VICE-CHANCELLOR said, that he had received a communication from the Master to that effect; the Master being of opinion that a Company completely registered under 7 & 8 Vict. c. 110, must be considered as fully formed. As his Honor agreed in the conclusion at which the Master had now arrived, it would be useless to send back the present case to the Master; and his Honor, therefore, acceded to the motion for placing Lord Mansfield on the list.

An appeal from this decision was heard before the *Lord Chancellor* on the 12th of January, 1850, when his Lordship reserved his judgment.

1850.
Jan. 14th.

On this day, the LORD CHANCELLOR said, that many of the facts relied on in the argument before him were not in evidence. Upon the facts in evidence, his Lordship saw no reason for dissenting from the decision which had been given, and ordered Lord Mansfield to pay the costs of the appeal and of the proceedings before the *Vice-Chancellor*; but gave him leave to go again before the Master to make out such case for his exclusion as he might be able.

WOODFALL'S CASE.

THIS was also a motion on behalf of the official managers, by way of an appeal from the decision of the Master, excluding from the list of contributories the name of the respondent, Mr. Henry Dick Woodfall, under the following circumstances:—

The respondent, Mr. Henry Dick Woodfall, who carried on business under the firm of George Woodfall & Son, was proprietor of two journals, called "The Polytechnic Journal," and "The Railway Register," in which were published articles in favour of the Company. The Company purchased five hundred copies of each journal, the respondent agreeing to take shares equivalent in value, in discharge of their account.

A Mr. Frank Hill, who was examined on oath before the Master, deposed as follows:—

"I was sub-editor of the 'Polytechnic Review,' and of the 'Railway Register,' of which Woodfall was proprietor. I called at the office of the Company, and saw Mr. Raymond, the then secretary. It was my duty to ask for the advertisements of the Company, also information as to their progress. Raymond was desirous of having the Company advertised, and gave me an order to do so. The arrangement was, that the Company was to take five hundred copies of each Magazine, and that the amount due was to be taken out in shares. I acted entirely for Woodfall. It was distinctly understood that he was to incur no liability, or be called on to sign the deed. The understanding was with Mr. Raymond and Captain Price, (the chairman of the Company). I went with Woodfall to the Company, when he went to receive the scrip: he was asked to sign the deed; he refused. They gave him the scrip. He

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A publisher furnishing a provisionally registered Company with goods, agreed with the chairman to be paid in shares, but so that he should incur no personal liability. Scrip certificates were sent to him accordingly, and the Company was afterwards completely registered. He sold the shares. On being required to sign the deed, he refused to do so, and took no further part in the affairs of the Company:—*Held*, that he was properly excluded from the list of contributories.

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had the scrip certificates. I believe he sold them at a small premium."

An account was made out at the time, and signed. It was as follows:—

"Universal Salvage Company, in Account with George Woodfall & Son.

Dr.		Cr.
1845.		1845.
To 500 Nos. of Poly- technic Review - 62 10		Aug. 20.—By 13 shares 5 <i>l</i> . deposit per share in the above Com- pany - - - 65 0
To 500 of Railway Register - - 62 10		By 13 shares 5 <i>l</i> . de- posit per share in the above Company 65 0
By difference of one Share - - - 5 0		
	130 0	130 0

Settled as per account above,
G. WOODFALL & SON."

The circumstances as to the registration of the Company are stated, ante, p. 53.

The following was the Master's note of his decision:—

"Henry Dick Woodfall, twenty-six shares, Woodfall & Son, proprietors of two journals, called 'The Polytechnic Journal,' and 'The Railway Register.' They advertised the Company in these journals: their account amounted to 125*l*. They agreed to accept shares equivalent in value, by reference to the deposit on shares, that is, twenty-five shares. The account produced, marked A., bears date the 20th August, 1845. One share was thrown in, making twenty-six shares. The account was signed by Henry Dick Woodfall, 'Woodfall & Son.' This transaction took place in consequence of a previous application of the di-

rectors. Scrip or provisional certificates were delivered to H. D. Woodfall; Woodfall is on the corrected list of shareholders returned to the Registrar's Office, and his name stands for twenty-six shares in the schedule to the deed, as first registered. When Woodfall went to receive the scrip shares, he was asked to sign the deed, but refused. They gave him the scrip. There was an understanding between Raymond and Price and Woodfall, that he was to be subject to no liability."

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Mr. *Russell* and Mr. *Prendergast*, in support of the motion.—The reasons for which Mr. Sharpus and Lord Mansfield have been placed on the list, apply equally to this case, for the stipulation attempted to be made by the respondent against his incurring any liability, was one inconsistent with the nature of the contract, and one into which the directors had no power to enter: *Morgan's case* (a).

The VICE-CHANCELLOR.—In *Morgan's case* I thought that, by what took place at the meeting, and otherwise, every shareholder had assented to the transaction. The *Lord Chancellor* took a different view of the evidence.

Mr. *Bacon* and Mr. *O. W. Farrer*, for the respondent.—The respondent entered into no contract, except upon condition that he was not to be liable, and the condition cannot be severed from the rest of the transaction. Either it was no contract, or it was a conditional one. Those who entered into it with him were competent to act for the Company in this respect.

Mr. *Russell*, in reply.—The circumstance of the respondent selling the shares precludes him from repudiating the contract, and he cannot annex to it a condition repugnant to its nature.

(a) 1 H. & T. 320; 1 Mac. & G. 225; 1 De G. & S. 750.

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The VICE-CHANCELLOR:—

I do not think that this case turns upon the fact of the shares having been sold, though perhaps it may be still more favourable to the respondent, if he parted with them before the Company was completely registered. It does not appear how that was. But the respondent contracted with those who, with propriety, may be considered as representing the whole Company, that he was to be under no liability. That being so, I think that his name ought not to be on the list, and I cannot disturb the Master's decision. The costs must come out of the estate(a).

(a) In a subsequent case, in the said, he had not, in deciding matter of the same Company, *Woodfall's case*, forgotten *Davidson's case* (ante, p. 21), but thought (Smallbone's case), heard on December 22nd, 1849, his Honor it did not apply.

July 7th,
 Nov. 7th, &
 Dec. 22nd.

In the Matter of THE NORTH OF ENGLAND JOINT-STOCK
 BANKING COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
 ACTS, 1848 & 1849.

J. B. 3 N. L. Cases 699

SANDERSON'S CASE.

THIS was a motion on behalf of James Sanderson, appealing from the decision of the Master, placing him upon

1. Where a person had entered into an agreement for the purchase of shares in a Company, which had been approved of by the Company, and a specific performance of which could have been enforced against him, he was held liable to be placed on the list of "contributories," although no complete or formal transfer of the shares, according to the deed of settlement, was made before the Company stopped payment.

2. The 7 Geo. 4, c. 46, s. 13, directing executions on judgments against Banking Companies to issue against actual members in priority to members at the time of the contract, does not of itself, and independently of express stipulation, render a member liable to be placed on the list of "contributories," in respect of liabilities incurred before he became a member.

3. The time when, for the purpose of being placed on the list, a contributory became a member, is the time when he entered into a binding contract to take shares.

4. An appellant from a decision placing him on the list of "contributories," need not bring before the Court a person who would be liable if he were not.

5. The 33rd clause of the Amendment Act of 1849, is retrospective, and in effect though not in terms, prevents a re-hearing before a Vice-Chancellor as well as before the Lord Chancellor, after three weeks, although the three weeks had expired before the Act came into operation.

Dodgson's Case post. p. 80. Et parke Jones id 674.
Cafes' Crois Case 2 D. M. 49572.
De Pass's Case 4 Sel. V Jones 552.
Helsby's Crois Cases 2 Law Rep. 89. 170

the list of contributories to the North of England Joint-stock Banking Company, under the following circumstances:—

In January, 1847, the executors of a Mr. David Chartres, of Newcastle-upon-Tyne, authorised Mr. William Paulin, of Berwick-upon-Tweed, to sell fifty shares in the North of England Joint-stock Bank, standing in the Company's books in the name of the testator David Chartres.

On the 27th of January, 1847, Mr. Paulin had an interview with Mr. James Sinclair, who was authorised to treat for the purchase of the fifty shares on behalf of the appellant Mr. James Sanderson; and after some negotiation Mr. Paulin, on the 28th of January, finally closed with Mr. Sinclair for the sale of the shares to Mr. Sanderson for 140*l*.; Mr. Sinclair thereupon paid the full purchase-money, and took from Mr. Paulin the following memorandum of the terms of sale:—

“ Mr. James Sanderson,

“ Berwick.

“ To the Executors of the late D. Chartres.

<p>“ 1847, <i>Jan. 22nd.</i></p>	{	<p>Fifty Shares of the North of Eng- land Joint-stock Banking Com- pany, including all dividends thereon, at 2<i>l</i>. 16<i>s</i>. per share . £140 0 0</p>
--------------------------------------	---	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------

“ All expenses of transfer, if any, to be paid by the purchaser.

“ January 28th, received the above by the payment of
Mr. J. Sinclair. W. PAULIN.”

The executors thereupon gave to the Banking Company the notices required by the deed of settlement, and which were dated the 23rd of January, 1847. The notices were left at the Bank on the 1st of February, 1847.

On the 25th of February, the directors consented to the

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transfer of the fifty shares by the executors to Mr. Sanderson.

It was the practice of the Banking Company, on the purchase of additional shares by a person who was at the time of such purchase already a shareholder in the Company, to transfer such additional shares into his name in the books of the said Company, without requiring any deed of transfer to him of the additional shares to be executed, and it was also the practice of the said Company, when any party, not then a shareholder, purchased more than five shares in the said Company, to prepare and require to be executed a deed of transfer of five of such shares only from the vendor to the purchaser, and to transfer in their books the whole of the shares so purchased, and to issue new certificates in the name of the purchaser for the whole of such shares, upon the old certificates relating to the whole of the shares so transferred being given up to the said Banking Company to be cancelled.

On the 26th of February, 1847, the executors delivered the certificates of the fifty shares, then standing in the name of the late Mr. Chartres, to the directors of the said Banking Company to be cancelled on the transfer of the shares to Mr. Sanderson.

Mr. Sanderson not being, previously to the purchase, a shareholder in the Company, the directors prepared a deed of transfer of five of the shares from the executors to him, and delivered it to one of the executors on the 2nd of March, 1847.

One of the executors having procured the transfer to be duly executed by all the parties, including Mr. Sanderson, took the deed on the 8th of March, 1847, to the Banking Company, and delivered it into the hands of Mr. Hedley, one of the directors; whereupon the whole of the fifty shares were transferred by the directors in the books of the Company into the name of Mr. Sanderson, the ten certificates held by Mr. Chartres in respect of the fifty shares being

cancelled, and a new certificate for the whole number, dated the 26th of February, 1847, being made out by the Company, and signed by the managing director. The certificate was registered in the books of the Company, and it certified that Mr. Sanderson was the proprietor of fifty shares in the capital stock of the said Company, Nos. 17,948 to 17,952, 14,691 to 14,735, being the shares formerly belonging to David Chartres deceased.

On the same day the Company stopped payment in London, and from that time ceased to carry on the business of bankers, and only kept their office open for the purpose of winding up their affairs.

On the 25th of March, Mr. Benson addressed to the appellant the following letter:—

“ Newcastle, 25th March, 1847.

“ Sir,—I enclose the certificate for Fifty North of England Bank Shares sold to you by Mr. Chartres’ executors. I have paid the stamp and fees, 28s., which please to remit by P. O. order or cheque. “ Your obedient servant,

“ To Mr. James Sanderson, “ JOHN BENSON.”

“ Berwick-on-Tweed.

No sum had been paid to the Company by Mr. Sanderson on account of calls, nor had he ever, to the knowledge or belief of the official managers, received any dividends or profits from the shares.

In the return of shareholders made to the Stamp Office on the 17th of April, 1847, the name of Mr. Sanderson was included as a shareholder of the Company.

The following are the material clauses in the deed of settlement of the Company:—

“ No 26. Whenever, by any means whatsoever, any shares shall become actually forfeited, or shall be duly and effectually transferred to a new holder,

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then and in such case, and not before, the responsibility of the previous holder as a member of the Company in respect of such shares shall, so far as the law will in that behalf allow, cease and determine, and such previous holder shall be exonerated and released from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements in the deed of settlement contained, in respect of the same shares; provided, nevertheless, that nothing in this article contained shall extend or be construed to extend to release the previous holder of shares, so forfeited or transferred as aforesaid, from his proportion of the losses (if any) sustained by the Company, up to the period of his ceasing to be such holder as aforesaid.

“No. 32. Every person to whom shares shall be transferred, and who shall not then be a member of the Company and subject to the provisions of the deed of settlement in respect of any other shares, and every person who, being the husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder as aforesaid, shall, by notice in writing as aforesaid, signify to the directors his desire to become a member of the Company in respect of the shares vested in him in such capacity, and shall not, at the time of the said shares becoming vested in him by the means aforesaid, be a member of the Company, and subject, as last aforesaid, in respect of any other shares, shall, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered a member of the Company from the time of the same shares being so transferred to or so becoming vested in him as aforesaid;

but as to all profits, rights, privileges, benefits, and advantages to arise from the same shares, no such person shall be considered as a member in respect of the same, until he shall have executed the deed of settlement.

“No. 33. Every person in whom any shares shall vest, by transfer or otherwise, and who, previously to such vesting, shall have executed the deed of settlement, and who shall be a member of the Company to all purposes in respect of any other shares, shall, as to all the shares so vesting in him as aforesaid, be considered as a member from the date of the transfer to him, or from the time of leaving his title to shares in the banking house of the Company, or proving it as aforesaid, and shall not be required, nor shall it be necessary for him, again to execute the deed of settlement.”

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Upon the above facts, the official manager claimed to place Mr. Sanderson on the list for the fifty shares.

Mr. Sanderson objected to be placed on the list, and, after hearing the case argued, the Master, on February 12, 1849, decided that the name ought to be on the list only in respect of five shares, giving the following reasons for his decision:—

The Master divided the question into two parts:—the first, as to five shares; the second, as to forty-five shares. As to the five shares, there was, he thought, no doubt but that they were vested in Sanderson. The Company could not have denied his right to all the rights of a partner, whatever forms required by the deed had been omitted. The Company could not insist on them in opposition to Sanderson's title. Whatever importance (if any) might be attached to any omitted forms, any question on the want of them was set at rest by the certificate. Sanderson was,

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in the Master's opinion, conclusively received in the Company as a partner.

As to the forty-five shares, the Master said, that Sanderson himself had had no communication whatever with the Company, and had done no act, as a party interested in the bank, except the execution of the transfer of the five shares; and that the question, as to these forty-five shares, was, had they vested in him by "transfer or otherwise," so as to bring him within the 33rd clause of the deed of settlement, and thereby complete his title as a shareholder?

To understand what was meant by "transfer or otherwise," the Master referred to the 32nd clause, whereby it appeared to him, that by "otherwise," was meant title accrued by marriage, representation, or legacy. A party having shares so vested became entitled to the privilege given by the 33rd section, if previously to such vesting he had executed the deed of settlement, and become a member to all purposes in respect of other shares. The Master thought it impossible to bring Sanderson under that clause. The forty-five shares were not vested in him by "transfer or otherwise," previous to his executing the deed. The conditions under which the privilege given by the 33rd clause arises had never existed as regards Sanderson. The legal title was still in the executors. Whether they could compel Sanderson to accept the shares, or rather to indemnify them (for the shares could not now be transferred to or vested in him) against calls, the Company being dissolved; or whether Sanderson might file any bill, or bring an action to compel them to refund the consideration, were questions that, in the Master's opinion, left their respective rights in such doubt as to render it impossible for him to include Sanderson in the list in respect of these forty-five shares, whatever might be the true construction of the Act as to including any equitable shareholder. The Master therefore, according to his then present opinion, proposed to include Sanderson as a member in respect of five shares, and

to exclude him as to forty-five shares. With regard to the judgment in *Ness v. Sanderson*, which had been cited, the Master said, it could not be looked at as a legal decision on a legal question, but was nothing more than a compromise.

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The official manager then sought to place upon the list, in respect of the forty-five shares, the executors of Mr. Chartres, who appeared and opposed the insertion of their names. After hearing evidence and argument, the Master decided in their favour, intimating a doubt as to the correctness of his former decision as to Mr. Sanderson's case.

That case was consequently re-argued before him; and, on the 2nd May, 1849, he gave the following judgment:—

“The facts are: Paulin, the agent of the executors of David Chartres, commissioned Sinclair to endeavour to find a purchaser of these fifty shares. Sinclair offered them to Sanderson, and, after some hesitation and treaty about the dividend, Sanderson agreed to purchase them, and, in payment, not having cash, accepted a bill of exchange for 140*l.* at three months, which he paid at maturity. Sinclair acted for Sanderson in this treaty, and thereby became *pro hac vice* the agent of Sanderson, and as such, received the bought-and-sold note (exhibit A.), dated the 2nd of January, 1847, and handed it to Sanderson on the 23rd January. The executors, in conformity with the 22nd clause of the deed, signed the notices, which were left at the Bank on the 1st February. On the 26th February, 1847, the directors signed their assent to the transfer of the fifty shares to Sanderson by the executors. On the same day, the executors sent to the Bank the ten certificates of five shares each, which had belonged to the testator, and they were cancelled by the public officer, who wrote across them, ‘Transferred to James Sanderson, 26th February, 1847.—George Burdis.’ The ten cancelled cer-

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tificates were produced and marked by me with my initials. On the 2nd March, a transfer of five of the fifty shares was delivered to William Chartres, who executed it the same day, and having been executed by the other executors, it was subsequently, that is, on the 8th March, executed by Sanderson. The whole fifty shares were duly registered in the Bank books, and a new certificate was made out, certifying that Sanderson was the proprietor of these fifty shares. This bears date the 26th of February, 1847, the day on which the executors' shares were cancelled. The transfer was executed by Burdis after the stoppage of the Bank. The Bank stopped payment on the 6th of March, 1847. On the 17th March, 1847, the certificate was forwarded to Sanderson, who repudiated the shares as strongly as he could. As to the five transferred by the deed I have no doubt. In respect of them, Sanderson must be included in the list. As to the forty-five shares, my view of this case is changed, though I still think that the legal title in these shares did not vest in Sanderson, because the requisitions of the deed were not observed. Yet I think the facts are such as would support a bill against him by the executors, to compel him to accept a deed of transfer of these shares, and to execute the deed of settlement. As an authority for this, I refer to *Wynne v. Price* (a), in which the Vice-Chancellor *Knight Bruce* lately made a decree that the defendant should execute and deliver a deed of transfer, pay calls, &c. The principle upon which he proceeded is the same as would govern this case. Had the Company not been dissolved, they might have filed a similar bill. With respect to the non-observance of the requisitions of the deed, I have proceeded upon the maxim that each party was competent to renounce them. I should willingly adopt the argument of fraud (*suppressio veri*) as sufficient to meet the case made by the official manager, but the

(a) *Ante*, Vol. 2. *Post*. p. 310.

facts do not support it. No doubt the directors knew the state of the Bank in January, 1847, that it was in difficulties; but it was in March, six weeks after the contract had been entered into, that Burdis went up to London to endeavour to obtain pecuniary assistance. There was no actual deceit practised on Sanderson by any party. If he can resist the legal force of his acts in this case, the purchases of shares in Joint-stock Companies that will be invalid will be exceedingly numerous. But this argument, founded upon the *suppressio veri*, cannot apply to the executors. No doubt their wish to sell became an anxiety to sell, because, after the contract, they probably became suspicious of the state of the Bank; but it does not appear that they had other means of knowledge than the world in general, or than Sanderson had. The dates of the different transactions shew that there was no extraordinary pressure on the part of the Bank to carry the sale into effect. If the argument applies, it applies to the five as well as to the forty-five shares. I reluctantly express my intention to include James Sanderson in the list for the whole fifty shares, as, I think, I ought to have done on the first proceeding before me.

"2nd May, 1849.

"J. W. F."

Against this decision Mr. Sanderson appealed.

Mr. *Russell* and Mr. *Taylor* appeared in support of the motion, by way of appeal.

Mr. *Bacon* and Mr. *Headlam*, for the official manager, took a preliminary objection that Mr. Chartres' executors ought to have been served with notice of the motion.

The VICE-CHANCELLOR overruled the objection, saying that the Court had only to decide between the appellant and the official manager.

Mr. *Russell* and Mr. *Taylor*.—The Bank stopped before

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the transfer was complete. There was, therefore, no legal contract even as to the five shares; and as to the other forty-five, there is no ground for ascribing them to the appellant. The case as to them is put upon an oral contract, the explanation given being, that there was an irregular mode of doing business, adopted contrary to the terms of the deed of settlement. The Master proceeded on the case of *Wynne v. Price* (a). That case has no application to a contract respecting shares in a Banking Company where no instalments are payable. It merely regarded the liability of the purchaser to future payments, and decided nothing as to his being liable to previous losses, whether known or not to the vendors. The appellant never contracted to indemnify the vendors against past liability, nor to have anything to do with transactions antecedent to the date of the contract. This case cannot depend on the right of the executors of Mr. Chartres to file a bill for specific performance. If they filed such a bill against the appellant, the equities between the parties would depend on many circumstances not now before the Court.

The VICE-CHANCELLOR:—

It is true here, that at least as to part of the subject there is a contract that has not been carried into complete execution. Mr. *Russell* suggests that there may have been several defences probably open to a suit for specific performance. These defences the appellant had the opportunity of suggesting by affidavit; and he does not suggest any objection by way of affidavit, as far as I understand. He has not raised a case of fraud or improper conduct against the vendor. There appears to have been a complete contract made on the 28th of January, and the price then appears to have been paid. A still further step has been taken with respect to a portion at least of what was then bought. The executors of

(a) *Ante*, Vol. 2. *Part. p. 310.*

Mr. Chartres have uniformly approved of the contract, —the Company have uniformly approved of the contract. A week or more before the stoppage, the Company expressly approved of Mr. Sanderson as the purchaser of the whole of the fifty shares. I am of opinion, therefore, that Mr. Sanderson, under the particular circumstances, is very properly on this list in respect of those fifty shares. Whether there is to be a qualification as regards the time from which he is to be liable to losses is a different matter. The Master does not appear to me to have been asked to express his opinion on this point.

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Mr. Bacon and Mr. Headlam, for the official manager.—According to the 26th clause of the deed of settlement, the purchaser takes the whole liability of the vendor. The contract here is, that he should stand in the shoes of the transferor. [The *Vice-Chancellor*.—I suppose that there could not be a loss within the meaning of the 26th clause, unless, upon an account taken up to that time, (including the results of the subsequent transactions, then in progress), the effective assets of the Company were less than their liabilities. It cannot mean a loss on an individual transaction, though there may have been a gain on another; it must mean a loss on the general summing up.] There might be a loss, and yet not insolvency. This contract must be understood with reference to the statute affecting Joint-stock Banking Companies; according to the provisions of that Act, the existing shareholders are primarily liable, and until those existing shareholders are exhausted, there is no power of proceeding against the former shareholders (a). That provision clearly establishes the liability to be without qualification.

(a) See 7 Geo. 4, c. 46; *Steward v. Greaves*, 10 M. & W. 711; *Barker v. Buttriss*, 7 Beav. 134; *Dodgson v. Scott*, 2 Exch. 457; *Lund v. Blanshard*, 4 Hare, 9.

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The VICE-CHANCELLOR:—

The question of the liability to creditors is not before me in this case. The question before me is merely one as between the parties themselves. However the law may be as to creditors, I apprehend that, as between the parties themselves, this gentleman is only liable to losses from the 28th of January, 1847. I think that it had better be so expressed in the list. I do not understand this point to have been agitated before the Master. It seems to me that Mr. Sanderson contested a point that he ought not to have contested, and did not contest the only point which it was material for him to contest, and he must pay the costs of this motion.

The following was the order:—

“Let the name of James Sanderson, of Berwick-upon-Tweed, Grocer, remain in the list of contributories of the North of England Joint-stock Banking Company, as a member for fifty shares, with a qualification that the said James Sanderson is liable only as a contributory of the said Company subsequent to the 28th day of January, 1847; and let the said James Sanderson pay unto the official manager of the said Company his costs of this application, to be taxed by the Taxing Master of this Court in rotation” (a).

Nov. 7th.

A motion by way of appeal from this decision, was made before the *Lord-Chancellor* on November 7th, and refused, on the ground that the notice was not within the time limited by the Joint-stock Companies Winding-up

(a) See *Dodgson's case*, post, p. 85.

Amendment Act, 1849, which was held to be retrospective in its operation (a).

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Dec. 22nd.

Mr. Bacon and Mr. Headlam, in support of a motion to have the motion of appeal from the Master re-heard.—The *Lord Chancellor* has decided that the Joint-stock Companies Winding-up Amendment Act, 1849, s. 33, providing that no notice of motion for a re-hearing before the *Lord Chancellor* of any order of the *Master of the Rolls* or *Vice-Chancellors* shall be given after the expiration of three weeks after the order complained of shall have been made, operates retrospectively, and prevented an appeal in this case, although the three weeks had elapsed before the Act came into operation. This is so great a hardship that the Court will, if the terms of the Act permit, endeavour to relieve the official manager from it. Now, the clause is expressly confined to re-hearings before the *Lord Chancellor* of orders made by the *Master of the Rolls* or *Vice-Chancellors*, and therefore does not apply to a re-hearing before a *Vice-Chancellor* of his own order. Retrospective operation will not be given to an Act, unless so far as it is expressly provided by the terms of it.

Mr. Malins and Mr. Hallett, for the respondent, were not called upon.

The VICE-CHANCELLOR:—

Although a re-hearing before the same judge is not within the express terms of the Act, I think that it is within the spirit and principle of it; and that I cannot, consistently with the *Lord Chancellor's* construction of the section, re-hear the motion.

(a) See 1 H. & T. 486; 1 Mac. & G. 306.

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A widow who, as the executrix and residuary legatee of her late husband, was entitled to shares in a Banking Company, assigned them by deed to a trustee, previously to her marrying again. The trustee did not fulfil the requisitions of the deed of settlement, with reference to an assignee of shares becoming a shareholder, but he received the dividends, sometimes signing the receipts "for the executors" of the testator, sometimes "for the trustees of" [the widow by her widow's name.] There was an entry of the assignment in the books of the Company, but it did not appear by whom notice of it had been given:—
Held, that the trustee's name was properly placed on the list, but that his liability should be restricted to the time of the assignment; but, on appeal, the *Lord Chancellor* thought that the evidence was insufficient to fix the trustee with liability, and ordered the motion to stand over till the official manager had established his case in a court of law.

Where the liability is either upon the person placed on the list or on a stranger, it is not necessary for the official manager to bring such stranger to interplead before the Master.

HALL'S CASE.

THIS was the appeal of John Hall against the decision of the Master, placing him on the list of contributories under the following circumstances:—

Elizabeth Outerston was the widow of Andrew Outerston, who was a holder of six shares; she was his sole executrix and residuary legatee. Probate was granted to her of her husband's will; she employed John Hall, as a friend, to receive the dividends on these shares, and received them through him.

She afterwards married Robert Taylor, having previously to the marriage assigned the shares and other property to John Hall upon trust, to receive the income thereof, and pay the same to her, to her separate use, with usual clauses against anticipation.

The marriage with Mr. Taylor took place in 1842. Notice that John Hall was made a trustee of these shares appeared to have been given to the Bank, from an entry thereof made in one of the Bank books as follows:—

"John Hall, 26, Brandling-place, is appointed trustee by deed of 23rd of March, and invested with the entire control."

The year of the date of the deed was not inserted in the entry, and there was no evidence to shew when or by whom the notice was given, except by inference from the entry.

The returns to the registry office were very irregular,

and it was not until after the stoppage of the Bank that the name of John Hall was returned as trustee of Elizabeth Outerston.

It only came out in the progress of the investigation in the Master's office that Mrs. Outerston had married Robert Taylor. In the Company's books, and throughout the registry returns, she was called Outerston, whenever she was mentioned.

The clauses of the deed of settlement of the Company applicable to the circumstances of the case were the following:—

Nos. 28, 29, and 30, set out in *Armstrong's case*, 1 De G. & S. pp. 566, 567; No. 32, set out in *Sanderson's case*, ante, p. 70.

The proceedings between Mr. Hall and the Bank not having been according to these provisions, the question was, whether, notwithstanding their irregularity, John Hall was, as regarded the Company, a member.

The first dividend warrant signed by the appellant was as follows:—

“Capital Stock Account. Dividend Warrant.

“£2 9s. 6d. Dividend on Six Shares.

“The North of England Joint-stock Banking Company, pay Self or bearer 2l. 9s. 6d., being a dividend of 8s. 3d. per Share on the paid-up capital stock of the Company in my name, for the year ending 31st December, 1841, as declared at a general meeting held February, 1842.

“For Andrew Outerston's Executors.

“JOHN HALL.

“Newcastle-upon-Tyne, 8th March, 1842.”

The subsequent dividend warrants were in the same

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form, with the following changes in the descriptions which Mr. Hall prefixed to his signature:—

“ For the Executors of Andrew Outerston—JOHN HALL.”

“ For the Executors of A. Outerston and Self—JOHN HALL.”

“ For A. Outerston, Executors—JOHN HALL.”

“ Elizabeth Outerston's Trustee—JOHN HALL.”

“ Per pro. Elizabeth Outerston—JOHN HALL.”

“ For Trustees of Mrs. A. Outerston and Self—JOHN HALL.”

“ Executors of the late Outerston—JOHN HALL.”

“ For Elizabeth Outerston, Executor of the late Andrew Outerston—JOHN HALL.”

The Master retained the name of Mr. Hall upon the list, giving the following reasons in writing for his decision:—

“ It is necessary, first, to consider the relation in which Elizabeth Outerston, before the execution of the deed of trust, stood to the Company: she was executrix and residuary legatee, and received dividends by her agent for several years. If she had not married, and had continued to receive dividends, it would have been doubtful whether the official manager ought to have included her in the list in her own right or as executrix. (See the case of *Armstrong*, before the *Lord Chancellor*, on appeal.) According to the Vice-Chancellor *Knight Bruce's* judgment (a), she could be included only as executrix, and I should consider that judgment as a rule. But, by her own act, prior to marrying, she dealt with these shares not only as executrix, but in her own right,—she assigned these shares, as her own property, to Hall, as trustee for her. If Hall and Elizabeth had complied with the deed of settlement, and he had been duly received into the Company as a trustee

(a) 1 De G. & S. 570.

for her, there can be no doubt but that he must have been included in the list, because the terms are express that the Company shall look only to the trustee (a), and not to the cestuis que trust. He has not complied with these terms; but has he not so acted as to entitle the official manager to say, 'You renounced or waived observance of the requisitions of the deed. The Company also renounced or waived them. You expressed yourself as trustee of these shares; you claimed and received dividends as such trustee. We paid you dividends as such trustee. All objections which might arise from not adopting the machinery of the deed are removed by your and our conduct.' (See 2 Railway Cases, 728, *The Cheltenham & Great Western Union Railway Company v. Daniel*, in which is cited *The Sheffield & Manchester Railway Company v. Woodcock*, 7 Meeson & Welsby, 583).

"In the former case, Lord Denman says, 'I think the point is conclusively settled by *The Sheffield & Manchester Railway Company v. Woodcock*.' That shews that all difficulties that may arise from not adopting the machinery of the Act (the private Act) are got over by the conduct of parties who claim to be placed in the situation of proprietors, and are so placed accordingly. In this case, Hall's conduct is equivalent to a claim to be a proprietor.

"If Hall is not included in the list, no one else can be. It is clear that the husband Taylor cannot be, for the shares were not vested in Elizabeth when he married her. It is equally clear that she cannot be included. I reluctantly come to the conclusion that I must include John Hall as trustee for Elizabeth Outerston. He is so described in the list.

"25th of April, 1849.

"J. W. FARRER."

Mr. *Hallet*, in support of the motion of appeal, contended

(a) See the 12th article of the Deed of Settlement, set out in *Fenwick's case*, 1 De G. & S. 558.

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that Mr. Taylor and his wife, or one of them, should have been on the list, and that the official manager ought to have brought them before the Master, that they might interplead with the appellant; and that, at all events, no case was made out against the appellant.

Mr. Bacon and Mr. Headlam, for the official manager, were stopped by the Court.

The VICE-CHANCELLOR:—

In several of the cases which have occurred under the Act, the formalities prescribed by the deed of settlement had not been observed, but had been waived on both sides. This appears to me to be one of those cases, and I think Mr. Hall's name must remain on the list. He is, however, in my opinion, entitled to have a qualification inserted, restricting his liability to the date of the assignment; but, as he does not seek this by his notice of motion, he must pay the costs.

An appeal from this decision was heard by the *Lord Chancellor*, November 7, 1849, and was ordered to stand over to enable the question to be tried at law; his Lordship, however, intimating that the evidence before the Court was not sufficient to make the appellant liable (a).

(a) See *Ex parte Hall*, 1 H. & T. 581; 1 Mac. & G. 307.

DODGSON'S CASE.

THE Master, to whom the winding-up of the North of England Joint-stock Banking Company had been referred, inserted the name of Mr. Dodgson in the list of contributories, for 100 shares, without adding any qualification.

This was a motion made on behalf of Mr. Dodgson, that his name might not remain on the list, unless with a qualification limiting his liability as a contributory to a period subsequent to the 5th of December, 1846.

Mr. Dodgson, in the beginning of the month of September, 1846, purchased 100 shares in the Company, at 3*l*. per share. Of fifty of these shares, Elizabeth Flintoff, as the executrix of David Flintoff, was the vendor, and Miss Sumner was the vendor of the remaining fifty.

The whole 100 shares were sold to Mr. Dodgson in one parcel through a broker; to whom, on the 11th of the same month of September, he paid 300*l*., the purchase-money for all the shares. At the same time he and Elizabeth Flintoff signed an agreement for a transfer of five shares only to Mr. Dodgson, in consideration of 15*l*.

Mr. Dodgson was accepted, and was duly entered in the Company's books as the proprietor of 100 shares, and he received two certificates, dated respectively the 11th of December, 1846, in evidence that he was proprietor of the 100 shares.

Five of the shares, belonging to the executrix of David Flintoff were transferred to Mr. Dodgson by the following deed, which was executed by Elizabeth Flintoff and Mr. Dodgson:—

“This indenture, of three parts, made the 19th day of

but they cannot be considered as the agents of the body of shareholders to commit a fraud of this kind, nor is such a fraud a valid objection, the purchaser's name being on the list of contributories.

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Nov. 27th.
One hundred shares were sold in one parcel by a broker, for two vendors, of fifty shares each, in a Joint-stock Company. Five of the shares were transferred by deed by one of the vendors to the purchaser, and the purchase-money of the 100 shares was paid to the broker. The purchaser was accepted by the directors as the proprietor of the 100 shares, and his name was entered accordingly in the Company's books:—*Held*, that the 100 shares formed the subject of one contract, and that the whole must be governed by the terms of the deed of transfer of the five shares.

Directors fraudulently inducing a person to become a purchaser of shares in a Company may be personally liable to him,

Holmes Case 2 Belg. Macn. & Gor. 119. Bernard's Case 5 Belg. H. 286. Cape's Case 2 D. M. 83. 572. Helsby's Case 2 Law Rep. 70. 1st. B. & S. 1. add. 1. Rep. 1st. 155

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December, in the year of our Lord 1846, between Elizabeth Flintoff, of Newcastle-upon-Tyne, sole executrix of David Flintoff, of the same place, deceased, in the county of the same, of the first part; Robert Dodgson, of Wigton, in the county of Cumberland, druggist, of the second part; and George Burdis, of the town and county of Newcastle-upon-Tyne, public officer of the company or partnership called the North of England Joint-stock Banking Company, of the third part: Witnesseth, that the said Elizabeth Flintoff, in consideration of the sum of 15*l*. to her paid by the said Robert Dodgson, upon or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, sold, assigned, and transferred, and by these presents doth grant, sell, assign, and transfer unto the said Robert Dodgson, his executors, administrators, and assigns, all those five shares of her the said Elizabeth Flintoff, of and in the capital stock of the said Company, now standing in his name in the books thereof, with all dividends, interest, profits, proceeds, benefits, and advantages, incident to or arising from the said shares hereby assigned, to hold unto the said Robert Dodgson, his executors, administrators, and assigns, from henceforth for ever, subject to the covenants, provisoes, declarations, articles, stipulations, regulations, and agreements, contained and to be contained in the present and any future or supplemental subsisting deed of settlement of the said Company. And the said Robert Dodgson, for himself, his executors and administrators, doth covenant, promise, and agree, to and with the said Elizabeth Flintoff, her executors and administrators, and with the said George Burdis, his successors, executors, administrators, and assigns, that he the said Robert Dodgson shall and will, from time to time and at all times hereafter, in respect of the said shares hereby assigned, well and truly pay all instalments and sums of money now due or hereafter to become due there-

on, and also perform, fulfil, and keep all and every the covenants, stipulations, provisions, and regulations contained in the deed of settlement of the said Company, bearing date the 14th day of November, 1832, and also all other stipulations, provisions, and regulations for the time being, affecting or intending to affect holders of shares in the said Company; and shall and will, if thereto required by the directors, either expressly or by a general regulation in that behalf, execute a deed of covenant (to be prepared by the directors for that purpose) to and with the trustees or public officer of the Company, on the part of him the said Robert Dodgson, his executors, administrators, and assigns, duly to observe and abide by all the stipulations, provisions, and regulations, for the time being affecting or intending to affect holders of shares in the said Company. In witness whereof &c."

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No transfer of the other ninety-five shares was ever executed.

The Company stopped payment on the 6th of March, 1847, before Mr. Dodgson executed the Company's deed of settlement, and before he received any dividend.

After the Bank had stopped payment, the directors made a call of 5*l*. per share. Mr. Dodgson thereupon paid 500*l*. upon his 100 shares.

On the 30th of November, 1848, the Master charged with the winding up of the Company made a call of 30*l*. per share, and Mr. Dodgson was, on that occasion, allowed the 500*l*., the amount of the call made on him by the directors, and paid a further sum of 2500*l*. upon his shares.

On the 30th of June, 1848, Mr. Dodgson received notice of a further call made by the Master, of 20*l*. per share.

Mr. Dodgson made no objection to his being placed on the list of contributories by the Master, until the month of

1849.

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CASE.

July, 1849; but, on the 7th of that month, he first saw a report in the newspapers of *Sanderson's case*, and, on the 28th of the same month, he obtained special leave of the Court (a) to give notice of the present motion.

Mr. *Daniel*.—On the authority of *Sanderson's case* (b), Mr. Dodgson ought to have been placed on the list of contributories, with a qualification restraining his liability to commence on the 5th of December, 1846. His liability cannot be carried back beyond the date of his becoming a shareholder. By the Winding-up Act, 1848, sect. 92, it is enacted, "That the Master shall, subject to such appeal as herein provided, adjudicate upon and determine any matter in contest between contributories or classes of contributories, or between the Company and any individual contributories or classes of contributories, which may be necessary or proper to be determined, in order to the complete winding up of the affairs of the Company."

The object of this action is to exhaust the equities of all the contributories inter se; but in order that this may be done, the limit as to time of Mr. Dodgson's liability should be fixed at the time when the list of contributories is settled; and the persons who sold the shares to Mr. Dodgson should be upon the list in respect of those shares, to answer all the liabilities thereon prior to the 5th of December, 1846.

(a) By the Joint-stock Companies Winding-up Act, 1848, s. 99, which gives the right of appeal to the Court from the proceedings before the Master, it is provided, that, except on special leave of the Court, to be obtained on motion *ex parte*, or on notice, if the Court shall so direct, no such appeal shall be brought af-

ter the expiration of fourteen days after the order, direction, report, or other proceedings complained of shall have been made or shall have taken place by or before the Master, or after service of the same in case the party complaining shall not have been present.

(b) See ante, p. 66.

The VICE-CHANCELLOR.—Was section 92 of the Act (a) brought to the notice of the *Lord Chancellor* in *Morgan's case*?

Mr. *Daniel*.—No. There remains a latent litigation till the close of the proceedings in that case.

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CASE.

The VICE-CHANCELLOR.—In *Morgan's case* I was of opinion, upon the evidence of facts ultra the meeting, that every individual partner knew of the transaction with Morgan, and that, under the particular circumstances, he was released.

Mr. *Daniel*.—Upon the facts before the Court in the present case, Mr. Dodgson is liable as a contributory in respect of five shares only.

The VICE-CHANCELLOR remarked, that, in the deed of transfer to Mr. Dodgson, he covenanted with the vendor, and also with the public officer of the Company, to pay all instalments and sums of money then due, or thereafter to become due, in respect of the five shares; and that, in *Sanderson's case*, if the same circumstance existed there, it had not been called to his attention: if it had, he should, very possibly, have disposed of that matter differently.

Mr. *Daniel*.—Whatever may be the effect of that covenant as to the five shares, as to the ninety-five shares the transaction is still in fieri, and it remains to be seen whether the contract is such as this Court will enforce against Mr. Dodgson. He submits that the whole transaction is fraudulent as to him, and that, the transaction not being complete as to the ninety-five shares, the Court ought not, upon such

(a) The clause empowering the Master to decide matters in contest between classes of contributories.

1849.

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OF ENGLAND
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CASE.

a summary proceeding as the present, to treat it as a binding contract.

The question does not affect the creditors of the Company at all. Mr. Dodgson's name being on the list as a shareholder in respect of five shares, he is liable to the creditors as much as if he were on the list for 100 shares.

Mr. Bacon, Mr. Crompton, and Mr. J. V. Prior, for the official manager.

The VICE-CHANCELLOR.—I have held, that liability to the creditors is quite distinct from the liability of contributories under the Winding-up Acts.

The suggestion of fraud does not affect this case. No fraud is attempted to be fixed on the general body of shareholders. Whatever fraud there may be, if fraud there be, it is charged against the directors, who cannot be the agents of the body of shareholders to commit a fraud.

The directors only are liable for their conduct. If Mr. Dodgson could associate the whole body in any plan to entrap him into taking shares, I should probably know what to do with such a case.

The 100 shares formed the subject of a single contract. It appears to me that I must take the whole to be governed by the terms of the deed of transfer of the five shares. Now, as to the construction of that instrument, I have no recollection, nor do I believe, that the nature of the covenants was brought under my attention in *Sanderson's case*. However the question might stand upon a simple transfer, as the transfer in that case was treated as being, the covenants in the deed now before the Court are of a nature to throw the entire liability, both past and present, from the vendor upon the purchaser.

Mr. Dodgson wishes that some note of the transaction should be made in the Master's list, and I am willing that

*Wick's Case
3 Aug. 1849.*

the instrument should be referred to by its date; but it must be added, that the contract as to the ninety-five shares is of the same description as that in respect of the five shares.

The motion was refused, without costs,—the costs of the official manager out of the estate. The following memorandum was directed to be placed opposite to Mr. Dodgson's name in the list of contributories:—

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OF ENGLAND
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—
DODGSON'S
CASE.

“That Robert Dodgson was not an original shareholder in the Company; that he became so for these 100 shares in December, 1846, by a purchase of them in one parcel, through Jonathan Drewry, a broker, the shares at that time belonging, as to fifty, to the executrix of Daniel Flintoff, and as to fifty, to Catherine Sumner: five of the shares thus purchased together were comprised in a deed marked A., dated December 19th, 1846, the terms of which instrument correctly represent, *mutatis mutandis*, the terms of contract and the transaction as to the whole 100 shares.

1849.

August 1st. In the Matter of THE VALE OF NEATH AND SOUTH WALES
BREWERY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACTS, 1848 & 1849.

HITCHCOCK'S CASE.

A subscriber for shares in a Company, on terms of receiving 8*l.* per cent. on his subscribed capital in lieu of profits, having received a dividend on that footing, cannot effectually resist being placed on the list of "contributories" under the Joint-stock Companies Winding-up Act, 1848, on the ground that the deed of settlement did not authorise the issue of such preference shares.

THIS was a motion by way of appeal from the decision of Master *Brougham*, placing upon the list of contributories to the above Company the name of the appellant, Mr. F. M. Hitchcock, for six shares.

Mr. Hitchcock had been, previously to the month of August, 1841, living at South Molton, which is many miles distant from Neath, and was wholly unacquainted with The Vale of Neath and South Wales Brewery Company, or with any person connected therewith; but in that month he read the following advertisement in the *Times* newspaper:—

"Vale of Neath and South Wales Brewery.

"Capital, 125,000*l.* in 6250 Shares of 20*l.* each.

"Dividends payable 10th April and 10th October.—

"Deposit, 2*l.* per Share.

"Directors.

Joseph Stanscomb, Esq.,

William Brunton, Esq.,

W. H. Buckland, Esq.,

Geo. Walters, Esq.,

John W. Little, Esq.,

Joseph Rusher, Esq.

"The increasing demand for the Vale of Neath Ale and Porter, both for home consumption and export, induces the directors to make a further issue of shares in addition to the present subscribed capital of 90,000*l.*

"Subscribers for shares may either participate in the current profits rateably with the original shareholders, or take a fixed and limited dividend of eight per cent. per annum; the option to be signified at the time of subscrib-

ing. The deposit of 2*l*. per share to be paid on allotment; the remaining amount of 18*l*. per share may be paid promptly, or by three equal instalments at intervals of three months; subscribers to be entitled to the benefit of dividends from the time of payment. Information relative to the trade and prospects of the concern will be furnished by the directors at the Vale of Neath Brewery, Neath, Glamorganshire, to whom applications for shares may be made, or to Mr. G. W. W. Mason, 33, Bucklersbury, London."

1849.
In re
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 NEATH AND
 SOUTH WALES
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 ———
 HITCHCOCK'S
 CASE.

Upon reading this advertisement, the appellant was induced to apply for shares, which he accordingly did, remitting the amount in two letters, one being as follows:—

"South Molton, October 9, 1841.

"To the Directors of the Vale of Neath and South Wales Brewery Company.

"Gentlemen,—I beg to inclose the remaining half of the 10*l*. Bank of England note sent you, as well as the following half notes [their numbers were specified], being the full amount of five shares in your concern. By writing by return of post, acknowledging the inclosed, the remaining half notes shall be sent. I should here remark, that I determine on receiving eight per cent. per annum, in preference to the fluctuating interest. "Yours, respectfully,

"F. M. HITCHCOCK."

He remitted the other halves of the notes; and, on the 12th of October, 1841, he received from the secretary of the Company the following scrip certificate for five shares:—

"Vale of Neath and South Wales Brewery Company.

"Capital, 125,000*l*., in 6250 Shares of 20*l*. each.

"Five shares, Nos. 3720 to 3724. 100*l*. paid. Folio 125. The holder of this certificate, being duly registered in the

1849.
 In re
 THE VALE OF
 NEATH AND
 SOUTH WALES
 BREWERY CO.
 —
 HITCHCOCK'S
 CASE.

books of the above Company as the proprietor of the shares numbered 3720 to 3724, is entitled to all the profits and advantages arising therefrom, agreeably with the rules and regulations of the said Company's deed of settlement. In witness whereof, we, three of the directors of the above Company, have hereunto set our hands this 11th of October, 1841.

"Registered at Neath.

" W. BRUNTON,
 " J. STANSCOMB, } Directors."
 " J. RUSHER, }

" W. LOWTHER, Secretary.

At the time of taking the shares, the appellant had no knowledge whatever as to the truth of the allegation in the advertisement, that there was a subscribed capital of 90,000*l.*, and which was now alleged to have been wholly incorrect. It appeared that there had been a report presented to the first annual meeting of the Company, in which the directors had suggested that shares should be issued at a fixed and limited dividend of 8*l.* per cent.; and that the report was confirmed at the annual meeting of the Company, held on the 12th of May, 1841.

In the month of February, 1842, an additional share was forwarded to the appellant, by the secretary, with an intimation that he could have it at a discount of 5*l.* He remitted the proposed amount to the secretary, and received a scrip certificate in the terms before mentioned.

In October, 1842, he received from the secretary a cheque on the Company's bankers for 8*l.* 8*s.* 8*d.*, for one year's interest at 8*l.* per cent., less a few shillings.

He still held the shares, but contended, that he had been induced by fraud to take them; inasmuch as he was wholly unacquainted with the concerns of the Company, and took them on the faith of the statement, that 90,000*l.* had been subscribed.

There appeared to be no power in the deed of settlement to allot shares bearing a fixed rate of interest.

Mr. *Bacon* and Mr. *Toller*, for the appellant.—The transaction was illegal, and the appellant could never have enforced it. He was entitled to nothing, nor had he any legal right or benefit as a shareholder. He cannot, therefore, be held liable. There was no deed of transfer ever executed. There was merely a contract entered into under a misapprehension, and therefore one of which the Court will not, in the exercise of its discretionary jurisdiction, enforce a specific performance.

Mr. *J. H. Terrell*, for the official manager, was not called upon.

The VICE-CHANCELLOR:—

Assuming that the deed of settlement did not authorise the issue of "preference" shares, it is not competent to Mr. *Hitchcock* for any effectual purpose to allege that he is not a contributory. I think he ought to remain on the list.

The motion was refused, with costs.

1849.

In re
THE VALU OF
NEATH AND
SOUTH WALES
BREWERY Co.
—
HITCHCOCK'S
CASE.

1849.

In re
THE VALE OF
NEATH AND
SOUTH WALES
BREWERY Co.

Aug. 4th.

A shareholder in a Brewery Company sold his shares to one of the directors. His solicitor, through whom the sale was effected, had notice that the purchase was made by the director with a view of vesting the shares in the Company, to whom the director transferred them on the same day on which they were transferred to him. The deed of settlement did not authorise the purchase on behalf of the Company:—
Held, that the shareholder was properly placed on the list of contributories, under the Joint-stock Companies Winding-up Act, 1848, although seven years had elapsed since the transfer, and it had remained unquestioned during the whole interval.
Semble, that *Monday v. Guyer* and *Wood v. Rowcliffe* are not conflicting authorities.

RICHMOND'S EXECUTORS' CASE.

THIS was a motion by way of appeal from the decision of the Master placing upon the list of contributories the executors of a Mr. James Richmond. It appeared that Mr. Richmond was, in July, 1842, the holder of thirty shares in the Company, and that, on the 11th of July, 1842, he transferred them to Mr. Buckland, one of the directors, by whom they were, on the same day, transferred to the Company.

The material facts relating to the constitution of the Company are stated in *Morgan's case* and *Hollwey's case*, ante, Vol. I, p. 750 and p. 777.

The substantial question was, within which of those authorities the circumstances of the present case brought it. The evidence left the facts in some degree of obscurity, owing to the circumstance of Mr. Richmond and his solicitor, Mr. Fyson, through whom the negotiations relating to the transfer had taken place, having both died. The shares had been regularly assigned by deed, executed by Mr. Richmond, to Mr. Buckland, in whose name they were registered, in the same way as if he had been a stranger. The consideration, however, was paid by a note of hand of the Company, in the following form:—

“£600.

Vale of Neath Brewery, Neath,

“July 11th, 1842.

“Eighteen months after date, we promise to pay to Mr. James Richmond or order, the sum of Six Hundred Pounds, value received.

“For the Vale of Neath and South Wales Brewery Company.

“W. H. BUCKLAND.”

It appeared, that, previously to the transfer, Mr. Fyson had been in communication with Mr. Buckland and ano-

Evans v. Coventry 2 D.L. 49. 342.
Coleman's Case 1 D.L. 496.

ther director, named Rusher, on the subject of the shares, and that, in a letter from Mr. Fyson to Mr. Buckland, dated June, 1842, there was the following passage:—"Mr. Rusher promised me, some months ago, that Mr. Richmond's shares should be taken off his hands at par. If this be not done forthwith, I shall advise his calling a meeting of the shareholders, insisting on a thorough investigation of the affairs of the brewery."

In support of the claim of the official manager before the Master, to place the appellants on the list, Mr. Rusher was produced as a witness. He was objected to, on the voir dire, on behalf of the appellants, on the ground of interest. The Master, however, permitted him to be examined; and he deposed, that, to the best of his recollection, Mr. Richmond came to Neath about May or June, and was there for several days, but that the deponent never recollected speaking to him with reference to the shares. Mr. Rusher, however, stated, that he finally agreed with Mr. Fyson, that Mr. Richmond's shares should be purchased by the Company, and that Mr. Fyson urged the Company's acceptance of them, and agreed upon the terms. The Master considered, that, on the evidence of Mr. Rusher, it was clear that the sale was to the Company, and that the appellants must be on the list.

Mr. Lloyd and Mr. Roxburgh, in support of the motion.—Mr. Rusher's evidence is inadmissible, on the ground of interest: *Munday v. Guyer* (a). [The Vice-Chancellor.—It was stated to me in another case (b), that Sir James Wigram had taken a different view of the Act 6 & 7 Vict. c. 85, from that which I have taken (c). I was not then, nor am I now satisfied of this. The expression which I believe I used was, that when two defendants have exactly the same case and the same interest, I would not be the first Judge

1849.
In re
THE VALU OF
NEATH AND
SOUTH WALES
BREWERY CO.
—
RICHMOND'S
EXECUTORS'
CASE.

(a) 1 De G. & S. 182.

(b) See *Carrington v. Pell*, post. 512.

(c) See *Wood v. Rowcliffe*, 6 Hare, 183.

1849.

In re
THE VALM OF
NETH AND
SOUTH WALES
BREWERY CO.

RICHMOND'S
EXECUTORS'
CASE.

to hold that one might be examined on behalf of the other.] Assuming the evidence to be admissible, the circumstance that Mr. Rusher is proving his own case by it, must be a serious objection to its credit. But even if the evidence were admitted, and credit given to it, it does not bring home to Mr. Richmond notice that the purchase was made on behalf of the Company. To fix him with this notice, the evidence ought to be distinct, whereas Mr. Rusher's testimony is quite reconcileable with the existence of an understanding that the Company should find a purchaser, and with the fact of the agreement ultimately entered into having been a contract for a purchase by Mr. Buckland personally, in the form in which it was actually completed. Assuming this to have been the understanding, the case would be undistinguishable from *Hollway's (a)*. It differs entirely from *Morgan's case (b)*; for, there, notice was not and could not be disputed; and moreover, because the transfer in that case to Mr. Buckland had never been formally completed, there having been no certificate of registration in Mr. Buckland's name.

The VICE-CHANCELLOR.—It seems to me a just inference from the evidence, that, with Mr. Richmond's knowledge, Mr. Buckland acquired the shares in question with the intention of vesting them in the Company. I only desire to hear the respondent as to the alleged difference between this case and *Morgan's*, as to the completion of the transfer

Mr. *Russell* and Mr. *Terrell* stated, that in *Morgan's case* the form of transfer was exactly the same as in the present case.

The VICE-CHANCELLOR said, that if that were so, it would, in his opinion, be inconsistent with *Morgan's case*, to hold that Mr. Richmond was relieved, and treat the question

(a) 1 De G. & S. 777.

(b) 1 De G. & S. 750.

as one between Mr. Buckland and the Company, a view which, independently of that authority, his Honor would, so far as he had at present heard the case, have been disposed to take. He thought the case one of hardship, as the *Lord Chancellor* appeared to have considered Mr. Morgan's.

1849.
In re
 THE VALLE OF
 NEATH AND
 SOUTH WALES
 BREWERY Co.
 ———
 RICHMOND'S
 EXECUTORS'
 CASE.

The motion was refused, without costs, (the official manager's to come out of the estate,) and with leave for the appellants' counsel to speak to the matter again, if they should discover any substantial difference in the forms of the deeds of transfer in this and in *Morgan's case*. The case was not again mentioned.

In the Matter of THE LIVERPOOL AND MANCHESTER SAW MILLS AND TIMBER JOINT-STOCK COMPANY; *August 4th.*

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848.

HOLT'S CASE.

MR. HOLT was, in February, 1849, served with notice, under the provisions of the Winding-up Act, 1848, that his name had been placed upon the list of contributories by the official manager, and that the Master would, on the 1st of March, proceed to settle the list.

Mr. Holt had, some time previously, sold his shares, and was erroneously informed, that, on this account, he need not attend to the notice.

The 78th section of the Winding-up Act, 1848, provides, "That notice in writing shall be given to every person included in or proposed to be specially excluded from the list of contributories, or in any variation therein or addition thereto, as aforesaid, before the same shall be settled

Leave given to a person to dispute his liability to be placed on the list of contributories after he had (acting under wrong advice as to the law,) suffered the time appointed for that purpose by the Master to elapse.

1849.

In re

THE LIVER-
POOL AND MAN-
CHESTER SAW
MILLS AND
TIMBER JOINT-
STOCK CO.

HOLT'S CASE.

by the Master, thereby notifying that such person is included in or excluded from the list; and, if included, then in what character and for what number of shares, and of what amount, or for what other interest such person is so included; and that, if no cause shall be shewn to the contrary, to the satisfaction of the Master, by a day to be fixed by the Master, and to be specified in such notice, the list shall not, as to every person failing or neglecting to shew cause within the time to be so fixed, be afterwards disputed, without leave of the Court first obtained."

Mr. R. W. E. Forster, on behalf of Mr. Holt, now moved for leave for him to go in before the Master and dispute his liability to be placed upon the list. In support of the motion, a case of *Ex parte Ashburner* was cited, which was heard before his Honor on June 21st, and in which a similar order had been made, the application being unopposed. The note to *Hawthorn's case* (a) was also referred to, as shewing, that, upon the merits of his case, Mr. Holt was entitled to be excluded from the list.

Mr. Follett, for the official manager, opposed the application.

The VICE-CHANCELLOR gave Mr. Holt liberty to go before the Master, on his paying the costs of the application, and upon the terms of his prosecuting his claim to be exempted on or before November 16th.

(a) 1 De G. & S. 578.

1849.

Ex parte WOLESEY,In the Matter of THE GREAT WESTERN RAILWAY COMPANY *August 7th.*
OF BENGAL;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
Act, 1848.

THE only question raised on this petition, which sought the usual order for winding up the above Company, was as to the necessity of formal service upon the secretary. By the affidavit in support of the petition it appeared that the secretary was present at a meeting at which the petition was agreed to, and he appeared by counsel at the hearing of the petition and consented to it. But the Registrar would not draw up the order without the attention of the Court being drawn to the want of formal service.

Formal service of a petition for winding up a Company upon a secretary, *Held* not requisite, where the secretary was present when the presentation of the petition was agreed to, and appeared by counsel to consent to it at the hearing.

Mr. *T. H. Terrell* supported the petition.

The VICE-CHANCELLOR held formal service to be unnecessary under the particular circumstances.

See *In re The Tring, Reading, and Basingstoke Railway Company*, ante, p. 10; and *Ex parte Dale, In re The Trent Valley and Chester and Holyhead Continuation Railway Company*, ante, p. 11.

1849.

*Nov. 3rd,
14th, & 19th.*

In the Matter of THE DIRECT LONDON AND EXETER RAIL-
WAY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
Act, 1848.

HOLLINSWORTH'S CASE.

The directors of a provisionally-registered Railway Company paid to solicitors employed by the Company a sum of money in respect of their bill of costs, which was not then delivered, and which, when delivered, fell short of the sum paid. The balance was claimed by the assignees of another solicitor, who had acted jointly with the former, in respect of certain extra costs not included in the bill; and the first-mentioned solicitors also claimed a lien in respect of subsequent costs:—*Held*, irrespectively of these claims, that the balance was not in the hands of the solicitors as "agents or trustees" for the Company, so as to give jurisdiction to the Master, under the 66th section of the Winding-up

THIS was a motion, by way of appeal, to discharge an order of Mr. *Brougham* (the Master charged with the winding up of the above Company), directing that the appellants, Nathaniel Hollingsworth, Charles Rich Tyerman, and John Johnston, or one of them, should forthwith, or on or before the 5th day of November then next, at No. 4, Sambrook Court, Basinghall-street, in the City of London, pay to William Charles Wryght, the official manager of the Company, the sum of 541*l.* 1*s.*, being the balance in their hands in respect of the affairs of the Company. The order was expressed to be without prejudice to any question between the parties or any other parties in this matter.

The appellants, who practised as solicitors, were appointed solicitors to the Company, to act jointly with David Edwin Columbine, who had previously been the Company's solicitor. They prepared the necessary parliamentary contract, gave the requisite notices, prepared the book of reference for the whole line from London to Exeter, and made the requisite deposits at the parliamentary offices and at the offices of the clerks of the peace of the several counties through which the line passed. They also transacted various other professional matters for the Company during such joint solicitorship.

During the progress of those proceedings the provisional committee paid to the appellants 500*l.* on the 20th day of November, and to Mr. Columbine 500*l.* on the 27th day of

the Winding-up Act of 1848, to direct it to be paid to the official manager.

November, and those sums were entered in the books of the Company as payments to the solicitors jointly.

The provisional directors having called a meeting of the shareholders for the 15th of December, 1845, expressed their anxiety to ascertain and pay all the liabilities of the Company prior to such meeting, and applied to the appellants for the accounts of the joint solicitors. They were informed, however, that it was impossible to prepare the account on such short notice; and it having been consequently arranged that an estimate should be given, they informed the provisional directors that the amount of the whole would not be less than 6000*l*. On the 12th of December, 1845, the provisional directors paid the appellants 4000*l*., making, with the 500*l*. previously paid, 4500*l*., for which a receipt was given in the following form:—

1849.
In re
THE DIRECT
LONDON AND
EXETER
RAILWAY Co.
—
HOLLINGS-
WORTH'S CASE.

“12th December, 1845.

“Received of the Provisional Directors of The Direct London and Exeter Railway Company, 4500*l*. in part payment of the joint account of Mr. Columbine and ourselves, as solicitors to the Company.

“£4500.

“STOKES, HOLLINGSWORTH, TYERMAN, & JOHNSTON.”

When the payment was made, it was distinctly stated to be made subject to an investigation of the bill when delivered.

On the 15th of December the provisional directors paid the appellants a further sum of 1750*l*., of which 1000*l*. was a payment on account of the solicitors' joint costs, the remaining 750*l*. being added to be applied towards discharging the bills of various country agents.

On the 27th day of December, 1845, the provisional directors informed the appellants that they had empowered Mr. Rooper, of the firm of Rooper, Birch, & Ingram, so-

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licitors, to investigate and settle the claims of the country agents, and requested the appellants to return the 750*l.*, which was accordingly done. The directors also proposed that Mr. Rooper should tax the appellants' bill, to which proposition they agreed. The bill being completed was by desire of the provisional directors delivered to Mr. Rooper. The amount was 5253*l.* 7*s.* 11*d.*, and it was headed, "The Direct London and Exeter Railway Company to D. E. Columbine, and Stokes, Hollingsworth, Tyerman, & Johnston."

Mr. Rooper went through the charges in the bill, and reported that they were fair and reasonable, and that he could not take off anything from the total amount.

Sometime afterwards Mr. Columbine delivered his charges against the Company during the periods of the joint solicitorship, amounting to 857*l.* 8*s.* 7*d.*

The appellants paid Mr. Columbine the agreed amount of his proportion of the profit of the joint bill, and about the same time Mr. Columbine gave them notice not to part with the difference in their hands between their bill and the 6000*l.* paid, and he also gave them notice that he should hold them accountable for having returned the 750*l.*

The appellants stated, that after their bill had been delivered and agreed to, they were called on to pay sundry charges for advertising, printing, and agency, incurred during the period embraced by it, which they had been unable to obtain in time to include in the bill, and which amounted to 505*l.* 11*s.* 1*d.*, leaving only 541*l.* 1*s.*, and no more, available for Mr. Columbine out of the 6000*l.* paid to the joint solicitors.

The appellants further stated, that, during the years 1847 and 1848, they were employed by the Company in a variety of matters as their sole solicitors, Mr. Columbine's connexion with the Company having ceased in the month of December, 1845, and that their bills of costs for several of such matters were, in January 1848, delivered, taxed,

and paid by specific cheques, but that certain costs and disbursements, which they specified, still remained owing and unpaid to them.

These costs were incurred in defending an action of *Wontner v. Shairp*, brought by a shareholder in the Company against four of the provisional directors, to recover back his deposit, and in prosecuting a suit in Chancery of *Bell v. Lord Meaborough*, instituted for effecting several objects, the principal of which were, the recovering from the defaulting members of the provisional committee the deposits on the shares agreed to be taken by them, and recovering from a sub-committee of the Company, called the finance committee, sums spent by them in the purchase of shares or otherwise unaccounted for; and that the total amount of costs and payments due and owing to them from the Company and its provisional committee was 734*l.* 16*s.* 11*d.* One of the appellants also deposed, that the appellants had been instructed by the provisional directors to pay themselves what was owing to them out of such part, if any, of the sum of 6000*l.* as might remain in their hands after meeting the claim of Mr. Columbine.

Mr. Columbine had become bankrupt, and his assignees had applied to the appellants in respect of his claim, and had not abandoned it.

On behalf of the appellants it was also stated, that, in the event of Mr. Columbine or his assignees succeeding in establishing any part of his claim, the appellants, as joint solicitors with him, would be entitled to a proportionate part of the profits arising therefrom.

The Master considered the appellants not entitled to charge these costs against the Company, and made the order in question as regarded the balance of 541*l.* 1*s.*, which they admitted to remain after payment of those bills of costs which had been settled and investigated.

The section of the Act on which the decision of the Mas-

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ter and the argument upon appeal proceeded was the 66th, which provides as follows:—

“After the appointment of the official manager of the Company, the Master shall from time to time, by order to be made upon the application of the official manager, or of any contributory, trustee, receiver, banker, or agent, to pay, deliver, or transfer forthwith, or within such time as the Master shall direct, into the hands of the official manager, any sum or balance, books, papers, estate, or effects which shall happen to be in his hands for the time being, and to which the Company is *primâ facie* entitled.”

Mr. *Lloyd* and Mr. *Hetherington*, in support of the motion.—The Master had no jurisdiction to make the order. The powers conferred upon him by the Act are merely for the purpose of determining questions and administering justice as between the members and contributories of the Company, and not as between the Company and third parties. It is true that there is in the 66th section a special provision for the case of persons holding in their possession effects of the Company as trustees, receivers, bankers, or agents; but the provision is an exception to the general scope of the Act. And this case is the very reverse of that contemplated by the 66th section; for, so far as the Company from being here the party *primâ facie* entitled to the balance, that the appellants are the persons *primâ facie* entitled to it. Nor do the appellants fall within any of the descriptions of persons over whom the section gives the Master jurisdiction.

Mr. *J. V. Prior*, for the assignees of Mr. *Columbine*.—The balance in question belongs partly to Mr. *Columbine's* estate. The case of *Wilson v. Lord Curzon* (a) was the

(a) 15 M. & W. 532.

authority on which the Master relied, as displacing the claim of the assignees. The Master assumed that case to have established the general proposition, that a promoter of a Company, who is afterwards employed on its behalf, has no claim against it for his services. And as Mr. Columbine was the promoter of this Company, the Master, on that authority, held that his estate could have no claim. *Wilson v. Curson*, however, will not be found to lay down any such general doctrine, but to have been decided on its own peculiar circumstances.

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Mr. *Swanston* and Mr. *Daniel*, for the official manager.—
In 1845 the Company was projected; Mr. Columbine was one of the promoters, and he and the appellants were the joint solicitors to the Company. In December, 1845, a change took place, and Mr. Columbine ceased to be one of the solicitors. The provisional directors desired to ascertain what was due to the joint solicitors, and they paid 6000*l.* in respect of the joint bill. This the provisional directors had no power to do. The monies in their hands were trust monies, which they had no power to advance in that manner, and the appellants had notice of the breach of trust. The scheme having failed, through malfeasance of its originators, they had no right to charge the expenses against the subscribers. Nor had the appellants any right to apply the funds of the Company to any extent in payment of their bill of costs. The consequence is, that instead of only calling on the appellants to refund the balance of 541*l.*, the Master might probably have ordered them to pay the whole 6000*l.* This is clear from the two cases, in respect of the costs of which the appellants make a portion of their claim, viz. *Bell v. Lord Mexborough* (a), and *Wontner v. Shairp* (b). These cases decide, that in this case there never was any Company formed, and that

(a) 5 Railw. Cas. 149.

(b) 4 Com. B. 404.

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there are no debts or demands which could properly be paid on the deposits. As there could be no such debt, so there could be no lien on the monies in the hands of the appellants forming part of those deposits. But at all events, the order is good, because it is confined to the balance admitted by the appellants to remain in their hands after deducting the amount of the bill delivered by them. The claim of Mr. Columbine's assignees might properly have been regarded by them, and will be regarded by the Court, as disposed of by *Wilson v. Lord Curzon* (a). The principle of the decision in that case is explained by Baron Parke in these words: "The provisional committee are a delegated body acting for others, and *primâ facie* any contract they make, made on behalf of those who appointed them, and orders given by them, are *primâ facie* the orders of the projectors, including the plaintiff." The claim of the appellants for a lien in respect of subsequent costs of their own is altogether unsupported, they having altogether omitted to shew that they were incurred with the sanction of, or are properly chargeable against the Company or the subscribers.

Mr. Lloyd, in reply.—The argument that there was no Company in this case, proves too much for the respondents, because the only ground on which the order can be supported is, that the money is assets of a Company. If there was no Company each subscriber must recover back his own money, and the order must be wrong.

The VICE-CHANCELLOR:—

Nov. 14th &
 19th.

The motion of which I have to dispose, (made early in this term, on behalf of Messrs. Hollingsworth, Tyerman, & Johnston,) seeks to discharge an order made by the

(a) 15 M. & W. 532.

Master in the matter of the Act of the 11 & 12 Vict. c. 45, and of the Direct London and Exeter Railway Company. The order is dated the 3rd of August last, and expressed in these terms:—[His Honor read it.] It was in substance conceded at the bar, (and I think correctly,) that if there was jurisdiction in the Master to make the order, the jurisdiction was given by the 66th section of the Act. That section does not contain the word “debtor;” and the mere fact, if clearly proved against Messrs. Hollingsworth, Tyerman, & Johnston, or admitted by them, of a debt of 541*l.* 1*s.* being due from them to the Company, would not have enabled the order to be made. Does there, then, exist here the quality of “contributory, trustee, receiver, banker, or agent,” which are the words of the section? Of “contributory,” “receiver,” or “banker,” I apprehend certainly and plainly not. The Master I suppose to have thought that the word “trustee,” or the word “agent,” embraced the case. Assuming, however, that Messrs. Hollingsworth, Tyerman, & Johnston were agents of the Company, I find myself unable, upon the evidence, to say that they received the money in question in that character or capacity. If an agent employed, not gratuitously, has received money from the principal, expressly in payment or towards payment of the services, (excluding or including disbursements for him by the agent,) that money cannot, I think, be stated to have been received by the agent, as agent, or otherwise than as a creditor, or a person claiming to be a creditor. Here, therefore, I must say, that, in my opinion, the facts do not bring the appellants within the operation or meaning of the word “agent,” as used in the section.

Then, as to trusteeship.—Express trusteeship is out of the case. It was argued that there was a constructive trusteeship, by reason that, as it was said, the money in dispute is part of a sum which, as I understood it to be contended, was paid to the appellants in breach of a trust,

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upon which the persons who made the payment were said to have held it, and the appellants were alleged to have received it, with notice, and so to have become themselves trustees of it—trustees, the argument must have meant, for the Company. If the evidence had appeared to me sufficient to support this contention, so far as mere matter of fact is concerned, (which it has not done,) I should still have thought that a trusteeship, so merely constructive, was not within the meaning of the section, for the appellants did not receive the money under any contract, or with any assent on their part to be trustees of it, or otherwise than as money on account of a debt which they claim to be due to them, or to them and Mr. Columbine,—money to be retained by them for their own use, or for the use of themselves and Mr. Columbine, except so far (if at all) as it should on investigation appear to exceed the debt due. That it does or did exceed the debt due I cannot (considering the contention of Mr. Columbine's assignees) represent myself as satisfied. It may or may not be so. But were I satisfied of the existence of excess, it would make no difference in my conclusion upon the present motion.

Viewing the language to be construed, and the effect of the undisputed facts, as I do, I am obliged to avow, that if I had been in the Master's place, I should have refused the application on which the order of the 3rd of August was made.

This case must be added to the number (already, I believe, not small) of those in which judicial opinions have differed in the exposition of this statute.

Whether, apart from the ground on which I have placed my decision, the order is open to objection, I think it unnecessary to pronounce any opinion. But I may add, that although the Company, or the official manager, may possibly be entitled to recover the 541*l.* 1*s.* in question, or some part of it, in some manner, (a point on which I say nothing,)

I have not been persuaded by anything that I have read or heard, that the Company is, in the language of the Act, *prima facie* entitled to the money. If I have jurisdiction to direct payment to the appellants and Mr. Columbine's assignees of their costs before the Master, on the application in question, they should, I think, be paid out of the estate under the administration of the official manager. This I consider reasonable, whether I am right or wrong in treating the case as not falling within the 66th section. But I am ready to hear counsel as to this.

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Mr. *Lloyd* submitted, that the 104th section of the Winding-up Act of 1848 enabled the Court to exercise its discretion in each case as to the costs of the appeal, but admitted that the Court had no jurisdiction as to the costs of the proceedings in the Master's Office.

The VICE-CHANCELLOR said he should have been disposed to take an opposite view, and in any event did not think he ought to give any costs of the motion to the appellants.

The case stood over, to be again spoken to on the subject of costs, and ultimately the order of the Master was discharged, without costs (a).

(a) The Order of the *Vice-Chancellor* was enrolled, and, on Dec. 15th, 1849, a motion on behalf of the appellants was made before the *Lord Chancellor* to vacate the enrolment and reverse the order; but the *Lord Chancellor* refused the motion, with costs, holding that there was no ground for exempting orders made under the Winding-up Acts from the ordinary practice of the Court as to the effect of enrolment. *Re Direct London and Exeter Railway Company*, 1 H. & T. 587.

1849.

Ex parte DEE,

Nov. 10th. In the Matter of THE UNIVERSAL TONTINE LIFE INSURANCE
COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

The circumstance that policies of a Life Insurance Company are still in force, and that the liabilities of the Company upon them cannot be settled for many years, is not sufficient to render it inexpedient to make an order for winding up such a Company, under the provisions of the Joint-stock Companies Winding-up Act, 1848.

THIS was the petition of a contributory to a Life Insurance Company, for the usual order to have its affairs wound up, under the provisions of the above-mentioned Act of Parliament. The Company had ceased to carry on business, and the directors had transferred its business to another Insurance Company. The validity of this transfer was impeached by the petition.

Mr. *W. T. S. Daniel* and Mr. *Roxburgh*, in support of the petition, adverted to the circumstance that a Life Insurance Company was expressly within the words of the 10 & 11 Vict. c. 110, which were by reference incorporated in the Joint-stock Companies Winding-up Act, 1848.

Mr. *J. H. Palmer*, for some of the directors, contended that, on various grounds, it was not necessary or expedient for the Court to exercise the discretionary jurisdiction given to it by the Act, and particularly on the ground that the liabilities of the Company upon the outstanding policies could not be settled for many years to come.

The VICE-CHANCELLOR considered the objections insufficient, and made the usual order.

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In the Matter of KOLLMANN'S RAILWAY LOCOMOTIVE AND
CARRIAGE IMPROVEMENT COMPANY;

Nov. 19th.

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

KUPER'S ASSIGNEES' CASE.

THIS was a motion, by way of appeal, on behalf of Edward Edwards, Baron Dickenson Webster, and Augustus Leopold Kuper, the official and creditors' assignees of the estate and effects of William Kuper, a bankrupt, seeking the reversal of the decision of the Master, whereby the names of the appellants were included in the list of contributories of the above-named Company, as such assignees, in respect of thirty shares.

The bankrupt was one of the original shareholders in the Company, and the deputy-chairman of the provisional committee appointed for establishing it. He was afterwards deputy-chairman of the board of directors. He was the holder of thirty shares, and had paid 260*l.* in respect of them.

The following were the material clauses of the deed of settlement of the Company:—

By the 97th it was provided, that, in case of the bankruptcy of any proprietor, his assignees should not be proprietors in respect of his shares, or be entitled to hold them as members of the Company; but that, in case his assignees should be desirous to hold such shares as proprietors, then that such assignees should give notice in writing to a board of directors of such desire as therein mentioned, and thereupon the assignees should become the proprietors of such shares.

By the 98th clause it was provided, that, in case no person should become proprietor of a bankrupt's shares for the space of two years from the period of his bankruptcy, then

The deed of settlement of a Company provided, that, in the event of the bankruptcy of a shareholder, his assignees should not be entitled to hold his shares without giving notice. It also enabled the directors, in the same event, to declare the shares forfeited, and provided, that, in the meantime, the bankrupt's estate should be liable, so far as the law would allow, to the payment of calls. On winding up the Company under the Joint-stock Companies Winding-up Act, 1848:—*Held*, that the names of the assignees of a bankrupt shareholder were properly inserted in the list of "contributories" in their character of assignees.

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In re
KOLLMANN'S
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KUPPE'S
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CASE.

that the board of directors should have the liberty to declare such shares forfeited; and that, until such declaration was made, the estate or effects of the said bankrupt, so far as the law would allow, should be chargeable with all calls which shall be made in respect of such shares.

The fiat issued on the 15th of September, 1848, and the adjudication took place on the 30th of the same month.

On the 30th of January, 1849, the bankrupt obtained his certificate.

The appellants did not make any claim to the shares as part of the bankrupt's estate and effects, nor had they done any act to testify their acceptance, as his assignees, of the shares.

The certificate of the appointment of the appellants as assignees had not been left at the office of the Company, nor had their appointment been in any manner communicated by them to the Company.

No declaration that the shares of the bankrupt in the Company should be forfeited was ever made by a board of directors.

The Master, on June 21st, 1849, certified that he had settled the list, as regarded the appellants, by including them, as assignees of the estate and effects of the bankrupt, in the list as contributories in respect of thirty shares.

Mr. Bacon and *Mr. John Bailey*, in support of the appeal.—The appellants object to their names being placed upon the list. Whether the name of the bankrupt or the estate of the bankrupt should be placed there, is another question; but there is nothing in the Act to make the appellants liable to have their names inserted as contributories. The Act defines contributory to mean a member of a Company, or any person liable to contribute to the payment of any of its debts, liabilities, or losses, "when

ther as heir, devisee, executor, or administrator of a deceased member, or as a former member, or as heir, devisee, or executor of a former member deceased, or otherwise howsoever."

Now, the words "otherwise howsoever" must, of course, be held to apply to cases ejusdem generis with those specified; and the case of assignees of a bankrupt does not come within that description; for, in the cases specified, the person answering the definition is, to some extent, personally liable. His liability may be limited by the amount of assets coming to his hands or descended upon him as heir, but the liability is a personal one, and the subject of a proceeding against him at law. No such proceeding could be taken against an assignee, nor does an assignee incur any personal liability to discharge any debt or liability of the bankrupt.

The 88th section of the Act provides that the official manager may prove for the amount of a call made upon the bankrupt. The 30th section of the Amendment Act of 1849 enacts, that the official manager may prove, under the bankruptcy of a contributory, for the balance ordered by the Master to be proved against the contributory's estate. These provisions shew that it was not intended by the Legislature that the assignees of a bankrupt should be liable to be inserted in the list of contributories by their names.

Mr. Russell and *Mr. Glassey*, for the official manager, were not called upon.

The VICE-CHANCELLOR:—

I understand that the bankrupt held shares in the Company. His estate should, therefore, be placed on the list. The question is, whether the Master has done more than this. If there were any fear of the appellants being sub-

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jected to personal liability by the qualified insertion of their names, I should be willing to alter the list. But I have not heard anything approaching to an argument to that effect.

The motion was refused, with costs.

Ex parte FISHER,

*Nov. 24th &
 Dec. 3rd.* In the Matter of THE WEXFORD AND VALENCIA RAILWAY
 COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
 ACTS, 1848 & 1849.

A Company was provisionally registered for making a railway of 170 miles, to complete the communication from London to the Western Coast of Ireland, and a subscription contract was executed, authorising the directors, among other things, to apply for an Act to construct only a portion of the line if they thought fit. Afterwards, a portion of the scheme was abandoned by the directors, and the deposits applied to procure an Act,

which was obtained, for making a portion of the line, forty miles only:—*Held*, not a proper case for an order upon the petition of a scrip-holder under the original agreement for winding up the affairs of the Company, under the provisions of the Joint-stock Companies Winding-up Act, 1848.

Ex pte Wise 12 Grey 468.

full power was given to the directors to carry out the plan, and also to fix the amount of the capital of the Company, and to increase or diminish the amount; and the parties thereto of the first part agreed to pay the sums set opposite to their respective names, for the purpose of forming the railway; and the directors were authorised to apply for an Act in the next session of Parliament, with full power and authority to confine the application to the main line or lines only, or to any portion of the main line or lines respectively, omitting the remaining portion thereof, and with full power to omit all or any part or parts of the branches. There was also a proviso, that, in case the directors should not, within twelve months from the date thereof, succeed in procuring from Government an undertaking that their harbour should be established as a packet station between Ireland and North America, they should state the same to a general meeting of the subscribers, who should have power to declare, and should declare, whether the undertaking should then be abandoned, and the deposits (minus the expenses) returned, or whether the undertaking should be continued, so far as might be applicable to or affected by a station for packets at Valencia harbour.

By the subscribers' agreement, executed by the same parties, and dated also the 5th of June, 1845, after reciting that it was possible that the said intended application to Parliament might not be successful, and that it was expedient that the directors should in that case be authorised to renew the application in the session then next ensuing, or any following session, the parties thereto of the first part covenanted that it should be lawful for the directors, subject to the agreement thereafter contained, to renew such application to Parliament in the then next ensuing or any subsequent session, for making the said railway, or such part thereof as the directors should

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think expedient; and further, that, for the purpose of enabling the directors to make such second application to Parliament, the said parties of the first part would execute such further or new subscription contracts, and do all such other acts as the Standing Orders of the Houses of Parliament should render necessary.

The application for an Act under these agreements having failed, a new subscribers' agreement was prepared, to enable the directors to apply for an Act in 1847, and was executed by the proportion of subscribers required by the Standing Orders of the Houses of Parliament, including some of the original subscribers; and under its provisions the directors obtained an Act for making a part of the line for a distance of about forty miles only, being a railway from Killarney to the harbour of Valencia.

The petitioners had not executed the last agreement. It was stated, in support of the petition, that no such meeting had been called, as was directed by the former deeds, to declare as to the abandonment of the scheme, in the event of a packet station at Valencia not being secured; and that, at a meeting which had been called on June 5, 1846, the subscribers present made no declaration on the subject, but only a resolution to abandon the bill for the then present session of Parliament.

Mr. *Malins* and Mr. *G. L. Russell*, in support of the petition.—The rights of the petitioner, and of the subscribers to the original project, who did not sign the new deeds, were not affected by the Act of Parliament incorporating the existing Company. The liabilities of the first Company remain to be provided for, as well as the rights of the parties to a return of the residue of their deposits, after the proper deductions, according to the stipulations of the deeds of 1845. These objects can only be effectually accomplished under the provisions of the Winding-up Acts. To shew that the di-

rectors had no power to apply the deposits in the construction of the short line, they cited *Cohen v. Wilkinson* (a), *Colman v. Eastern Counties Railway Company* (b).

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Mr. Bacon, Mr. Lloyd, and Mr. T.H. Terrell, in opposition to the motion, were not called upon.

The VICE-CHANCELLOR:—

To say nothing of the time at which this petition was presented, not earlier than October last, it appears to me to raise points, and to be presented under circumstances rendering it unfit for the Court to interfere in the particular jurisdiction under which this petition is presented. In the language of the Act (c), it is not a case in which it appears to me “necessary or expedient” to make the order sought. The petition must be dismissed with costs, and without prejudice to a bill being filed.

An appeal from this decision was heard before the *Lord Chancellor* on December 3, and dismissed with costs.

(a) 1 H. & T. 554; 1 Mac. & G. 481.

(b) 10 Beav. 1.

(c) Sect. 12.

1849.

Dec. 19th.

In the Matter of THE GERMAN MINING COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
AMENDMENT ACT, 1849.

STONE'S CASE.

It was stated on behalf of the official manager, that the assignees of a bankrupt contributory had made such payments in respect of shares held by the bankrupt as would render the assignees personally liable as contributors, and that this would appear by the accounts signed by the assignees, and appearing upon the bankruptcy proceedings. The Commissioner acting in the bankruptcy declined permitting the Registrar to attend with the proceedings to verify this statement. The official manager then summoned before the Master the surviving assignee, who stated, that he could not, without inspecting the proceedings, say whether he had signed such accounts; and that he believed that he had no right to inspect them for the purpose of enabling him to answer the question. His examination was adjourned, to enable him to apply for leave to inspect them; but, on his again appearing, he had not done so:—*Held*, that his answers were unsatisfactory; and *semble*, that they rendered him liable to be committed under the 12 & 13 Vict. c. 108, s. 19.

THIS was a motion, on behalf of the official manager, for the commitment to the Queen's Prison of Mr. George Stone, under the 19th section of the Joint-stock Companies Winding-up Amendment Act, 1849, for not answering to the satisfaction of the Master charged with winding up the affairs of the above Company.

The 19th section of the Act provides, "that it shall be lawful for the Master, under the powers of the Joint-stock Companies Winding-up Act, 1848, to require any evidence to be given or discovery to be made before him respecting the estate, dealings, or affairs of any contributory or deceased contributory of the Company, or respecting any other matter in which the Company may be interested, and which might have been compelled or obtained in any suit in equity at the instance or on the behalf of the Company; and that any person who shall be summoned before the Master, for the purpose of giving any such evidence, shall be deemed to be within the provisions and penalties of the said Act with respect to witnesses."

The clause of the Joint-stock Companies Winding-up Act, 1848, above referred to, enacts, with respect to witnesses summoned under its provisions, as follows:—"And it shall be lawful for the Master to examine every such person upon oath, by word of mouth, or upon interrogatories in writing, concerning such Company, or the estate, dealings, or affairs

and that he believed that he had no right to inspect them for the purpose of enabling him to answer the question. His examination was adjourned, to enable him to apply for leave to inspect them; but, on his again appearing, he had not done so:—*Held*, that his answers were unsatisfactory; and *semble*, that they rendered him liable to be committed under the 12 & 13 Vict. c. 108, s. 19.

thereof; and every person so summoned who shall not come before the Master, or shall refuse to be sworn and examined, or shall not fully answer to the satisfaction of the Master, or shall refuse to sign or subscribe his examination, or shall refuse to produce or shall not produce any such book, paper, deed, writing, or document, shall be liable to be committed to the Queen's Prison: provided always, that every such default or refusal shall be certified by the Master; and thereupon such order shall be made by the Court, upon motion for that purpose, of which notice shall be given to the person sought to be affected, as the Court shall see fit."

The respondent, Mr. Stone, was the sole surviving creditors' assignee of a bankrupt contributory to the Company, named Richardson, and his name was upon the list of contributories as settled by the official manager.

He appeared before the Master, to oppose the retention of his name on the list. One of the grounds on which the official manager contended that the name was properly on the list was, that the assignees had made such payments on account of the bankrupt's shares, as amounted to an acceptance of them, and that an admission of such payments having been made, appeared upon the accounts signed by the respondents in the bankruptcy. A summons under the Winding-up Act was issued to the Registrar of the Court of Bankruptcy, who had custody of the bankruptcy proceedings, requiring him to produce them before the Master. The Commissioner acting in the bankruptcy, (Mr. Goulburn), however, on application being made to him upon the subject, declined to authorise the Registrar to produce the proceedings.

A summons was then obtained from the Master, requiring Mr. Stone "to appear before the Master, to be examined, and to bring with him and produce all books, accounts, proceedings, papers, deeds, writings, and other documents in his possession, custody, or power, in anywise

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relating to any payment or payments made by him, or by the official assignee of Christopher Robinson, or by any other person or persons, by his the said George Stone's order or direction, or with his privity, consent, or approbation, for or on account of any call or calls in respect of any share or shares in the Company, held by Christopher Robinson at the time of his bankruptcy, or otherwise relating to the said shares or either of them, or to the affairs of the Company."

On the 28th of November, 1849, Mr. Stone was summoned before the Master, and deposed as follows:—

"I was appointed one of the creditors' assignees under Christopher Robinson's bankruptcy, which took place in or about December, 1837. Mr. B. Sewell, jun., since deceased, was the other creditors' assignee; George Gibson was the official assignee. To the best of my belief I never once saw the official assignee's accounts: I may have seen the books in which they were kept, but I never recollect examining the accounts. I have no recollection of having seen an account of George Gibson exhibited on the 17th of May, 1838, of which an alleged extract is now shewn to me; but I say, if that is alleged to be a copy of my signature, I believe I did not sign it, because my father was then living, and I was in the habit of signing my name as George Stone, jun. My father was never assignee of Christopher Robinson. [Looks at a similar exhibit, dated the 20th of December, 1838.] I have no recollection of having signed that or any other account of the official assignee. As to this signature, the same objection applies as to the former exhibit. I think I have not looked at the proceedings under the bankruptcy for years,—certainly not recently."

The counsel for the official manager then applied that the further examination might be adjourned, to enable

Mr. Stone to inspect the accounts in the bankruptcy. The Master acceded to this application, and issued another summons to Mr. Stone, requiring him to produce the proceedings in the bankruptcy, and giving him notice of the particular portions of the accounts and matters upon which he would be examined.

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On the 18th of December, Mr. Stone attended, and deposed as follows: "I have received a summons, appearing to be signed by the Master: it was served on me on Wednesday morning last; I have not inspected the proceedings in bankruptcy, in consequence of the summons. To the best of my belief I never signed any account of George Gibson, the official assignee in the bankruptcy of Richardson. I do not recollect having signed any such account."

Q. Do you believe that you have a right of access to the proceedings in the bankruptcy of Richardson, to whom you are assignee?

The examinant's counsel objected to the question, but the Master overruled the objection.

A. That is a question I cannot answer: I do not know.

Q. Have you any belief one way or the other?

A. I believe I have not the right.

Q. Have you ever applied to the Commissioner for liberty to inspect the proceedings?

A. I have not.

Q. Or to the Registrar?

A. No.

Q. To any person at all?

A. No.

Q. Have you any recollection of having signed an account of George Gibson, the official assignee, exhibited on the 17th of May, 1838?

A. I have none.

Q. Or of any account of George Gibson, exhibited in December, 1838?

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A. I have not.

Q. Have you any recollection of having signed any account of George Gibson, the official assignee?

A. I have not.

Q. Will you undertake to say that you have not signed any such account?

A. I will not.

Q. Look at the paper marked A. A., now placed in your hands, and say whether, according to the best of your belief, you ever signed an account of that date or any account containing those items?

A. To the best of my belief, I did not.

Q. I ask you the same question with respect to the paper I now place in your hands, A. A. A. What is your answer to it?

A. I give the same answer as the last.

(The examinant here read over his examination on the 28th of November.)

Q. Do you adhere to the whole of that statement?

A. I do.

Q. Has a final dividend been made under Richardson's bankruptcy?

A. The bankrupt's estate has not been finally wound up: whether there will be any further dividend to the creditors I cannot say. There has not been one for many years.

The Master, on the application of the counsel for the official manager, gave the following certificate, under the Acts, that the examination of the witness was unsatisfactory.

“ Master's Office, Southampton Buildings,
 8th December, 1849.

“ In the Matter of The Joint-stock Companies Winding-up Act, 1848, and of The German Mining Company.

“ In pursuance of the above-mentioned Act, section 63, and of the Joint-stock Companies Winding-up Amendment

Act, section 19, I hereby certify that George Stone, of Lombard-street, in the city of London, banker, an alleged contributory, who had been summoned to appear and be examined before me, (being the Master charged with the winding up of the above Company, and who, accordingly, attended and was examined by me upon oath, on the 28th day of November last and on this day, has not in his examination on this day fully answered to my satisfaction.

“ W. H. TINNEY.”

Mr. *Lloyd* and Mr. *Bigg*, in support of the motion, cited *Taylor v. Rundell* (a) and *Stuart v. Lord Bute* (b), and contended, that, if the examinant were a defendant to a Chancery suit, he would be bound, according to those authorities, to have gone to the Bankruptcy Court and inspected the proceedings, to enable him to answer the questions put to him, and that, therefore, according to the 12 & 13 Vict. c. 108, s. 19, he was bound to have done so in this case, unless he had been able to state that he had been refused access to the proceedings, but that he could not truly make such a statement.

The VICE-CHANCELLOR said, he never heard that an assignee could be refused permission to inspect the proceedings.

Mr. *Russell* and Mr. *Rogers*, for Mr. Stone.—Mr. Stone was summoned as Mr. Richardson's assignee, only for the purpose of showing that the bankrupt's estate was liable to contribute. He was not summoned in his individual capacity, but as creditors' assignee. Now he had no right to inspect the proceedings for the purpose of prejudicing the estate. It is true that an assignee has the privilege of access to the proceedings, for the benefit of the estate and the creditors; but he cannot use the privilege to their

(a) Cr. & Ph. 104.

(b) 11 Sim. 442; 12 Id. 460.

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prejudice. The proceedings cannot be inspected by parties having an interest adverse to the creditors; and in this very case the Commissioner refused permission for the Registrar to attend with them. What parties adverse to the creditors cannot lawfully do directly, they will not be permitted to attain indirectly, by such a proceeding as this. In *Taylor v. Rundell* the defendant was, from the circumstances of the case, bound to answer.

The VICE-CHANCELLOR:—

I think that the Master was most justly dissatisfied with Mr. Stone's answers. It rests with Mr. Stone to consider whether he will resort to the proceedings in bankruptcy to obtain information upon the matters as to which he knew that questions would be put to him. When he has obtained that information, the Master will judge how far the questions which may be put to him are such as may be lawfully put. Mr. Stone will then be able to object to any question unlawfully put. The best course will be to order the motion to stand over till the first day of next term. I recommend Mr. Stone, in the meantime, to endeavour to inspect the proceedings; and, in my opinion, his endeavour will be successful. I hope it will not be necessary to mention the case again.

His Honor intimated, that, if Mr. Stone should not take any further step, he would probably be committed.

The case was not again mentioned.

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AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.

MR. TURNER, an original holder of scrip in the above Company, presented a petition, praying that the Madrid and Valencia Railway Company might be dissolved and wound up.

Mr. James, another original scripholder, presented a similar petition, with a similar prayer.

The petitions were opposed on behalf of Mr. Chadwick, the chairman, and some other directors of the Company.

The two petitions now came on together.

It appeared, that, by a royal ordinance of the Queen of Spain, dated the 31st of December, 1844, which regulated all railway schemes in that country, it was declared that such schemes, before they should be entered on, should have one tenth part of the amount of their funds, or such other sum as the government of Spain should decide on, deposited in the Spanish bank of San Fernando, or in the Bank of Isabel the Second. A time was therein fixed for complying with the several required formalities. By article 42 it was provided, that, if the works should not be

By the prospectus of a Joint-stock Company, provisionally registered in England, it was proposed to form a Company, to be constituted a "Compania Anonima" in Spain, for the construction of a railway in that country. It was therein stated that the affairs of the Company would be conducted by a board of directors in London, (where the Company had an office,) assisted by a committee in Madrid. The objects of the Company having failed—*Held*, that the English law applied to such a Company, and

that it was within the jurisdiction of the Court to dissolve the Company and wind it up.

In a Joint-stock Company, projected to consist of 120,000 shares, with a deposit of 2*l.* a share, 53,000 shares were subscribed for, and the deposits were paid upon them, prior to February, 1846. The promoters obtained from the Spanish Government a right to construct a railway in Spain, and deposited 30,000*l.* as a guarantee for the formation of the railway, subject to forfeiture if the works were not proceeded with. The preliminary surveys were made, but litigation having arisen among the shareholders, no further progress was made in the undertaking, and the deposits of the Spanish shareholders were returned to them by the directors in Spain, upon an agreement to redavance them when wanted:—*Held*, a proper case for ordering the Company to be wound up under the Joint-stock Companies Winding-up Act.

Semble, that a Company ought not to be charged with the costs of more than one petition for an order to wind up its affairs.

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commenced within the prescribed time after the concession, the same should be lapsed or null, and the Company should be at liberty to withdraw such part of the money deposited in the bank as should be remaining, if the concession should lapse.

By article 43 it was declared, that, if the railroad should not be made within the time stipulated, the concession should be considered as annulled.

In 1844, the Queen of Spain, by a royal ordinance granted to Prosper Bernard de Volney & Company the right to construct a railway from Madrid to Valencia, subject to certain regulations contained in a document of even date therewith, intitled, "Special Conditions under which the Company represented by Prosper Bernard de Volney, and Associates of London, are authorised to make a railway from Madrid to Valencia."

These conditions contained many clauses, among which was an article by which P. B. de Volney and his associates of London bound themselves to deposit, within eighteen months, in the Bank of San Fernando, or of Isabel the Second, 10*l.* per cent. in cash on the value of the shares; and by another article, as a guarantee that the concessionaries would observe those conditions, they obliged themselves to deposit in the Bank of London, within forty days, 3,000,000 of reals, to devolve to the state if the condition of making such deposit in a Spanish bank should not be fulfilled.

In September, 1845, Mr. de Volney entered into an arrangement with Mr. Chadwick, and other persons in London, to construct the railway, and issued a prospectus proposing the formation of a Joint-stock Company, with a capital of 2,400,000*l.*, in 120,000 shares of 20*l.* each, with a deposit of 2*l.* per share. The prospectus contained the following paragraphs:—

"One third of the shares are, by the terms of the concession, ceded to Spain. The locale of the Company will

be in Spain, and it will be framed on the principle of a 'Compania anonima,' agreeably to the commercial code of that country.

"The affairs of the Company will be conducted by a board of directors in London, assisted by a highly influential committee in Madrid.

"Scrip certificates will be exchanged for certificates of shares, the holder of which may, at his option, have them registered, in conformity with the Spanish commercial code.

"On the 19th of November, 1845, de Volney assigned all the concession granted to him by the Queen of Spain to Mr. Chadwick and ten other persons, as trustees for the Madrid and Valencia Railway Company."

The prospectus also stated that the office of the Company was at No. 37, Moorgate-street, London.

Boards of directors were formed in London and in Madrid; and out of the monies received for shares, 30,712*l.* 14*s.* 10*d.*, the value of 3,000,000 of reals, was invested in Three per Cent. Stock in the Bank of San Fernando, in lieu of the guarantie to that amount before required.

On the 8th of July, 1846, statutes and rules of the Company were, with the approbation of the Spanish Government, duly agreed upon, and signed at Madrid.

By the 1st article of these rules, an anonymous Company, under the name of "The Madrid and Valencia Railway Company," was constituted according to the laws of Spain. The English parties to this instrument submitted themselves, on behalf of those they represented and of themselves, to the competent Spanish authorities, for the due execution thereof, renouncing any laws that might favour them as foreigners, to which they might be entitled.

The Spanish Government subsequently conceded certain modifications of the conditions annexed to the grant.

By a royal ordinance, dated the 20th of October, 1846,

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further time was granted to the Company to comply with the required formalities.

It appeared that a large number of persons applied for and obtained allotments of shares in the Company; that, in the month of February, 1846, a general meeting of the shareholders of the Company was held at the London Tavern, Mr. William Chadwick, the chairman of the directors, being in the chair; and that at this meeting a report was made by the directors, whereby it was stated, that 53,000 shares, part of those reserved for England, had been subscribed for, and the deposit of 2*l*. paid, amounting to the sum of 106,000*l*. And it was further stated, that 50,000*l*., part thereof, had been invested at 4*l*. per cent.; that 30,712*l*., further part thereof, had been deposited as caution money in the Bank of England; that 21,112*l*. had been as to part invested in Exchequer bills, and as to other part remained in cash in the hands of the directors; and that 4014*l*. had been expended in engineering and other surveys.

Disputes arose between the shareholders in London and the directors, and an arrangement between them was projected; and thereupon the following protest was addressed by M. de Volney to the chairman and directors in London:—

“Aquilas, Iberia Works, 24th August, 1848.

“Gentlemen,—It is only by the public papers and by a private note that as yet I have learned the nature and suddenness of a private arrangement which is said to have been entered into by Mr. Chadwick, chairman of the Company, with some of the shareholders, to the effect of breaking up the undertaking and returning part of the original deposit of 2*l*. per share. I will express my surprise neither at the abruptness of the measure nor at the silence which has been kept on so important a subject with the concessionaries of the line. I will limit myself for the present, in my above quality of concessionaire, to protesting most

energetically and solemnly against such improbable proceedings, as tending to affect the obligation of the Company towards the concessionaries, and the rights created and guaranteed to the concession by that same Company, making the board and Mr. Chadwick responsible for all the losses and damages which might be the consequence of it to the concessionaire, reserving to myself to take such legal steps and preventive measures as will best protect the rights of the concession, or insure it ample and due compensation. An original shareholder, having been constantly faithful to the colours of the Company, obeyed all the resolutions of the board, and received from it and from its chairman the assurance that the undertaking was profitable, and would be carried out, I do protest most formally against the violation of such assurance, and declare that I do not recognise, either in the board or in the chairman, the right of altering, by private arrangement, their legal and public engagements, their obligation being either to make the line, or to return the whole deposit."

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In support of the petitioners' case it was alleged, that, although the necessary preliminary steps and surveys had been taken, the undertaking had wholly failed and became abortive; that the Company had long since ceased to carry on any business; that the undertaking had been wholly abandoned and given up; and that, although the Company still continued its name at an office at No. 19, Moorgate-street aforesaid, yet that it was merely nominally kept up, no business of the Company being carried on, except for the purpose of winding up its affairs. It was also sworn, that if any shares had been ever allotted to any persons in Spain, the deposits received thereon by the directors had been returned to the allottees; and that the Spanish directors, in March, 1848, caused an advertisement in the Spanish language to be inserted in the Spanish newspaper called "The Diaro Mercantil," and

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published in the province of Valencia, to the following effect:—

“Madrid and Valencia Railway Company.—Return of the money. The undersigned has received from the Spanish director of the said Company the following communication:—The Board of Directors in this country having taken, on the one hand, into consideration that more time has elapsed than they expected in commencing the works of the road, and, on the other hand, to commence those of the first section of the line, the Spanish money is not necessary, they have agreed to return for the present to the scripholders who may wish it the amount they have paid for the first passive instalment. With a view to this effect, the scripholders of Valencia will present themselves to receive the amount at the office of Dr. Antonio de la Cuadra, merchant in that city, and all the others at Madrid, at that of Dr. Mateo de la Murga, Calle de la Montera, No. 33. The scripholders in the provinces or abroad may remit the scrip indorsed to Madrid for the same purpose. In consequence of this communication I shall begin this day, from nine to two o'clock, to return to all those who have received their scrip at my office, Calle de Funeral, the money which they have disbursed, and the same will be continued every succeeding day at the same hours. To avoid loss of time, and to facilitate dispatch, I recommend to all the scripholders to bring their scrip, with the following receipt signed on the back thereof:—‘The Spanish Directors of the Madrid and Valencia Railway having agreed to return to those of the scripholders who may wish it, the money subscribed by them, in consequence of the same not being any longer necessary, I have consequently solicited for my share, and have received the same of Dr. Antonio de la Cuadra, amounting to , which, added to the sum previously received, makes the total amount of , the first dividend paid by me for this scrip.’

This form of receipt is valid for those scripholders who have received 5*l*. per cent., to whom the remaining 95*l*. per cent. will be returned; and, as regards the few holders who have not applied for the 5*l*. per cent., they will receive the total of what they paid, and bring receipts, as above, omitting only the following words: 'added to the sum previously received.' It is recommended to the scripholders to bring their receipts signed, in order that, on application, nothing more may be required than to count out the money which each is to receive. Valencia, 28th March, 1848.

(Signed) "ANTONIO DE LA CUADRA."

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It was also alleged and sworn, in support of the petition, that an advertisement to the like effect, and applicable to the Spanish subscribers in Madrid and the other provinces of Spain, except the province of Valencia, was, in the month of May, 1848, published in the Spanish newspaper called "The Diaro Oficial de Avisos de Madrid;" and that thereby notice was given, that such subscribers might obtain repayment of their respective deposits at the office of Dr. Mateo de Murga, Calle de la Montera, No. 33, in Madrid, on the delivery of the scrip which they had received from the Company; and that, shortly after the dates of such advertisements, all the Spanish subscribers received the amounts of their deposits, and gave receipts for the same in the form above set forth in the advertisement.

On payment by the English allottees of their 2*l*. per share, as above mentioned, to the bankers of the Company, scrip certificates were given to them, but they executed no subscribers' agreement.

Mr. James, one of the petitioners, however, deposed, that, according to the best of his belief, there were no persons resident in Spain who held shares in the Company; that no money had been ever paid on shares allotted to persons in Spain; that such shares as had been so allotted had become, and had been declared by the di-

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rectors, forfeited, and that the allotments had been cancelled; and, moreover, that Mr. Chadwick, as the chairman of the directors, had been endeavouring to obtain the return of the sum of 6,000,000 of Spanish reals, which had been deposited in the Bank of San Fernando at Madrid, and that that sum would be shortly returned to the Company.

On the other hand, Mr. Chadwick and four other directors deposed, that 7000 persons and upwards, resident in Spain, held shares in the Company, and that the directors in Spain had received deposits on such shares to the amount of many thousand pounds of English money, and that none of the shares allotted in Spain had been declared forfeited; that Prosper Besnard de Volney, a native of and resident in Spain, was the allottee of 1000 shares, on which he had paid the deposits, amounting to 2000*l*. They also denied that the allottees in Spain had been fully repaid their deposits and had given receipts thereon; but they admitted that the Spanish shareholders had received back their deposits, upon an arrangement, satisfactory to the Spanish directors, that the amounts should be re-advanced, when the litigation in England should have terminated. Mr. Chadwick admitted that, in 1848, he had endeavoured to withdraw the deposit of 6,000,000 Spanish reals from the Bank of San Fernando; but he alleged, that, the Government having refused permission, he had desisted from the attempt. He denied that the objects of the Company had been abandoned, or that all attempts to carry it out had been given up, or that they had become unattainable.

Mr. Chadwick, on his affidavit, set out at length the clauses of the Spanish Code applicable to the cases—first, of ordinary partnerships; secondly, of a *Compania in comandita*; and, thirdly, of a *Compania anonima*. He stated, that the last-named Company could be formed by creating

a fund by shares of a determined value and number, to be employed in the establishing and furthering one or several objects which gave the name to the Company, the management of which was intrusted to agents or directors, who might be changed and replaced at the will of the shareholders, and that the present Company was such as universally in Spain bore the name of "Compania anonima." In explanation of this statement, the following sections from the Spanish Code were referred to:—

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"Anonymous Company.

"No. 276. Anonymous Companies have no form, nor are they designated by the names of their partners, but only named and designated by the designation or name of the object or objects for which they have been established: they are to be established and formed as article 293 prescribes. It is a particular condition in the case of the Anonymous Company, that all the deeds and contracts of its establishment, and all the rules which are to govern its administration and management in every department, must be submitted to the examination of the Tribunal of Commerce of the district in which it is established, and without that tribunal's sanction they cannot be carried into effect."

"No. 329. Mercantile Companies are entirely dissolved, for the following causes:

First, the expiring of the time fixed upon in the contract of partnership, or the achievement of the especial object of its formation.

Secondly, the entire loss of the social capital."

"No. 330. The Companies that are established by shares can only be dissolved by the causes expressed in the paragraphs 1 and 2 of the 329th article."

Mr. *Malins* and Mr. *J. H. Palmer*, for the petition of Mr. *Turner*.

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Mr. Bacon, Mr. Welford, and Mr. Logie, for the petition of Mr. James.

Mr. Russell and Mr. Glasse, for the respondents, Mr. Chadwick, the chairman, and other directors of the Company.—The objects of this Company have not failed. The utmost that can be said is, that the Company's operations have been suspended; and that, owing to the depreciation in public estimation of the value of railway property in 1846, some of the shareholders in England attempted to dissolve the Company, and plunged the Company in litigation in this country.

It may be true that some of the Spanish shareholders who are desirous that the undertaking should be prosecuted have received back their deposits upon an arrangement (satisfactory to the Spanish directors), to readvance them as soon as the English litigation shall have been terminated. The royal concession to the Company is still in force, and the railroad may yet be constructed. The Company does not come within the provisions of the Act, as having ceased to carry on business.

The sum of 30,712*l.*, deposited in the Bank of England in the name of the Spanish Ambassador, must be forfeited, if the Court orders the Company to be dissolved. Considering this consequence, and the impossibility of doing justice between all parties, in a Company constituted and domiciled as this Company is, the Court, in the exercise of the discretion vested in it by the 14th section of the Winding-up Act, 1848 (a), should, it is submitted, decline to make the order, even if it should be of opinion that the Company might be dissolved.

But the Winding-up Acts have no application to this Company, inasmuch as it is essentially Spanish, and subject to Spanish jurisdiction exclusively.

The mere fact that the contract is to be performed in

(a) See *Ex parte Pocock, In re The Direct London and Manchester Railway Company*, 1 De G. & S. 742.

Spain would render it subject to the Spanish law. Mr. Justice Story says, "The performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance" (a).

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The original contract for the concession was made in Spain, by a Spanish subject, in a Spanish form; by the prospectus it was stipulated that one-third of the shareholders should be Spanish subjects; that the locale of the Company should be in Spain; and the constitution adopted for the Company of a *Compañía anonima* is unknown to the English law. All the circumstances constitute the Company Spanish, in origin, constitution, character, and domicile.

The VICE-CHANCELLOR said, the only point of the respondent's case that had made any impression on his mind was the foreign character and quality of the Company.

Mr. Bacon replied.

The VICE-CHANCELLOR:—

On reading the prospectus I find this passage: "The affairs of the Company will be conducted by a board of directors in London, assisted by a highly influential committee in Madrid." As this was one of the stipulations under which the Company was formed, it may, I think, be treated as subject to English, or at least as not exclusively subject to Spanish law; and under the circumstances of the case in other particulars, I think it proper, notwithstanding the connection of the undertaking with

(a) Story on the Conflict of Laws, s. 280; see also s. 233.

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a foreign country, to make the usual order for dissolving and winding up the Company.

I doubt whether a Company ought ever to be charged with the costs of more than one petition for an order to wind up its affairs. I will, however, in this case reserve the question of costs on both petitions, as it is the first time that the point has arisen.

The respondents appealed from the decision of his Honor.

The appeal came on before the *Lord Chancellor* on the 17th of January, 1850.

The *Lord Chancellor* concurred with the *Vice-Chancellor* in considering this to be an English Company, and subject to the Winding-up Act.

An order was then taken, by arrangement between the parties, that the order of the *Vice-Chancellor* should be discharged, upon an undertaking by the appellants to pay to the petitioners all the sums they had subscribed to the Company, and their costs, upon a certificate of the amount by the Taxing Master (a).

This undertaking not having been performed, the order for winding up was drawn up, and the Master proceeded to act under it.

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Mr. Bacon and Mr. Glasse now moved, on behalf of Mr. Chadwick, to discharge an order of the Master, whereby he had appointed an interim manager.

The VICE-CHANCELLOR declined to interfere, remarking, that the *Lord Chancellor's* order did not direct any interim stay of proceedings, though it directed the order to wind up to be stayed upon a condition which had not been performed; and, without laying down any general rule, but under the particular circumstances of the case, his Honor directed that the motion should be refused, with costs.

(a) See 1 H. & T. 597.

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Ex parte COLEMAN,

In the Matter of THE CAMBRIAN JUNCTION RAILWAY
COMPANY;

Dec. 20th.

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
Act, 1848.

MR. LLOYD and Mr. *Surrage* supported a petition to discharge an order for winding up the above Company, at the costs of the original petitioner who obtained the order, upon a petition, which omitted to state the facts, that the Company had been dissolved, and that a final dividend had been advertised in April, 1847. An interim manager had been appointed.

A petition to discharge a winding-up order must be served on the interim manager, if one has been appointed.

The VICE-CHANCELLOR asked whether the petition had been served on him.

Mr. *Lloyd* submitted it was not necessary to serve him, as his position was analogous to that of a receiver.

The VICE-CHANCELLOR thought he ought to be served.

Mr. *Glasse*, who appeared for the original petitioner, was instructed to appear for the interim manager. He admitted that *Ex parte Barnett* (a) decided the case.

The order was discharged, with costs.

(a) 1 De G. & S. 744.

1849.

Dec. 6th.

In the Matter of THE PATENT ELASTIC PAVEMENT AND
KAMPTULICON COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACTS, 1848 & 1849.

ARMSTRONG'S CASE.

A plaintiff in an action at law against a member of a Joint-stock Company for goods supplied to the Company, was stayed by a Judge at Chambers, at the instance of the defendant, after an order had been made to wind up the Company under the Winding-up Act, until after proof of the debt should be made before the Master. The plaintiff at law then went in before the Master, who disallowed the proof. The Court on motion gave the plaintiff at law leave to take or prosecute such proceedings at law as he might be advised.

MR. ARMSTRONG, who had supplied coals to the above Company, commenced an action at law, to recover the amount of his demand for such coals from a member of the Company.

Whilst the action was pending, the usual order to wind up the Company was made.

A Judge at Chambers, upon a summons taken out before him, ordered that all further proceedings should be stayed until after proof made of the debt before the Master, under section 73 of the Winding-up Act, 1848 (a).

Mr. Armstrong then went in before the Master, and exhibited proof of his demand under section 74 (b).

(a) Sect. 73.—After the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager, or against the Company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any Judge of the Court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all

further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master.

(b) Sect. 74.—The creditors of the Company making proof of their respective debts or demands before the Master, shall make proof thereof by deposition or affidavit, in the same manner in all respects as debts are now allowed to be proved in bankruptcy; Provided, nevertheless, that it shall be lawful for the Master to allow or direct the proof of such debts or demands, or any of them, to be made by the official manager, or by the creditors, in such other form and in such other manner as he shall think fit.

The Master disallowed the proof, under section 75(a).

This was a motion, by way of appeal from the Master's decision, that Mr. Armstrong might be at liberty to try the validity of his demand at law (b).

Mr. Roundell Palmer and Mr. Willcock, supported, and Mr. Russell, for the official manager, opposed the motion.

The VICE-CHANCELLOR directed that Mr. Armstrong should be at liberty, notwithstanding the certificate of, the Master, to take or prosecute such proceedings at law as he might be advised. The motion otherwise to stand over, with liberty to apply.

(a) Sect. 75.—The Master shall, upon proof made or offered and exhibited before him, of the debts and demands due or claimed from or against the Company, or any of them, either allow or disallow, or allow as claims, only such debts and demands respectively, according to the nature of the case, and of the proofs adduced or exhibited before him, and shall, by writing under his hand, declare such al-

lowance and disallowance, or such allowance as claims only.

(b) See *Thompson v. Universal Salvage Company*, 6 Dowl. & L. 465, where it was held that a judgment-creditor of a completely registered Company, in the course of winding up under the Act, must endeavour to obtain payment in the Court of Chancery before he can have leave to issue execution against a member.

1849.
In re
THE PATENT
ELASTIC PAVE-
MENT AND
KAMPTULCOON
Co.
—
ARMSTRONG'S
CASE.

In the Matter of THE ST. GEORGE'S STEAM PACKET
COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

LITCHFIELD'S CASE.

1850.
Jan. 24th.

THIS was a motion, on behalf of Mr. William Litchfield, by way of appeal from the decision of the Master who had

By the rules of
a Steam Packet
Company, share-
holders were en-

titled to a free passage by the Company's vessels, and there were some provisions in the deed of settlement for the event of infants being shareholders. A shareholder in the Company transferred shares to a son who was not of age:—*Held*, that entries in the Company's books, on the occasion of the son obtaining tickets as a proprietor, for a free passage, describing him as *Master*, did not affect the Company with notice of his minority so as to discharge the father in respect of the transferred shares; but that, on winding up the Company, the father's name was properly placed on the list of contributories in respect of the shares.

Litchfield's Case L. Rep. 4 Ch. 34

1850.
 In re
 THE
 ST. GEORGE'S
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 PACKET CO.
 LITCHFIELD'S
 CASE.

inserted his name in the list of contributories in respect of two shares in the Company.

The following is the substance of the material clauses of the deed of settlement of the Company:—

The 17th gave an unlimited power to each shareholder to alien his shares, and prescribed a form of transfer of the shares, to be executed by the transferrer and transferee.

The 18th provided that every transfer should be kept by the Company, and a memorial registered in the Company's books (a).

The 50th clause provided, that in case any proprietor, entitled to vote at any such meeting of the Company, should be a minor, he might vote at such meeting by his guardian.

The 51st clause provided, that the person by whom or in whose name any shares should be held or stand, should, to all intents and purposes whatsoever, be deemed, at law and in equity, the absolute, sole, and beneficial owner and holder of such shares, and should as such be the only person known to or recognised by the Company in all votes, transfers, notices, payments, receipts, and other matters relating to the same shares; and that the Company should in no case be bound to notice, or be affected with express notice of any trust or equitable charge imposed on any shares.

On the 18th of January, 1841, Mr. William Litchfield, the appellant, was the owner of three original shares of 100*l.* each, in respect of which he had signed the Company's deed of settlement. On that day he executed a transfer of two of the shares to his son Clayton Litchfield.

The transfer contained in the Company's transfer book was, according to the provisions of the deed of settlement, in the following form:—

(a) See *Maguire's case*, ante, p. 31.

"I, William Litchfield, Esq., of Cork, in consideration of value paid to me by Clayton Litchfield, Esq., of Cork, do hereby bargain, sell, assign, and transfer, to the said Clayton Litchfield, Esq., two shares of 100*l* each, Nos. 586 and 587, of and in the capital stock of the Company called the St. George's Steam Packet Company, to hold unto the said Clayton Litchfield, Esq., his heirs, executors, administrators, and assigns, subject to the same conditions as I held the same immediately before the execution hereof. And I, the said Clayton Litchfield, Esq., do hereby agree to accept and take the said shares, subject to the same conditions. As witness our hands the 18th day of January, 1841."

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The transfer was executed by the appellant and his son, the latter being under age, and not having attained twenty-one years until the 25th of March, 1845.

It was the ordinary practice of the Company to pay dividends on shares belonging to proprietors of stock to persons acting as the agents of proprietors for that purpose.

Two dividends were declared by the Company on the two shares, subsequently to the date of the transfer, and were paid to Mr. John Litchfield, another son of the appellant, on behalf of Mr. Clayton Litchfield. Mr. John Litchfield signed receipts for the dividends in the Company's books thus: "C. Litchfield, per J. Litchfield," and "For C. Litchfield, John Litchfield."

Mr. John Litchfield was himself a shareholder in the Company at the times of such receipt of dividends, and, at various times, as the agent of his father, received dividends on shares in the Company belonging to his father; and he also received dividends on his own shares.

Mr. Clayton Litchfield never received from Mr. John Litchfield, or otherwise, any dividend on the two shares transferred by him.

By a regulation of the directors, the proprietors or shareholders were entitled to a free passage in the Company's

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 In re
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 LITCHFIELD'S
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vessels, and Mr. Clayton Litchfield occasionally availed himself of this regulation. The Company's agents on these occasions entered his name in the Company's books as "Master Clayton Litchfield."

The Company was dissolved in the year 1843.

Mr. Clayton Litchfield did not, on his coming of age in 1845, accept the transfer, but had ever since repudiated it.

The Master, Mr. Farrer, placed the name of the appellant upon the list of contributories, on the grounds that his execution of the transfer while an infant, being an act to which he disagreed when he came of age, was a nullity; and that the use of a free passage by Mr. Clayton Litchfield was a profit to the father, inasmuch as it was his duty to pay the passage money for his son's voyages, which were undertaken by his authority.

Mr. Lloyd and Mr. Hetherington, for the motion.—In this case it is true there was an assignment to a minor; but it differs very much from *Reaveley's case* (a), inasmuch as, in that case, there was a distinct assurance that the transferee was of full age, which was fraudulent. Nothing of that kind is here suggested. The 17th clause of this Company's deed gives an unlimited authority to a shareholder to transfer his shares to any person whomsoever; and clauses 50 and 51 provide for the circumstance of minors being shareholders. Moreover, the Company must be assumed in this case to have had notice that Mr. Clayton Litchfield was a minor, for he is designated in the Company's books, "Master Clayton Litchfield." The transfer was therefore made by the father, accepted so far as possible by the son, and acquiesced in by the Company.

Now it is quite competent to a minor to purchase property, or to enter into partnership: *Good v. Harrison* (b), *Bruce v. Warwick* (c).

(a) 1 De G. & S. 550.

(b) 5 B. & Ald. 847.

(c) 2 M. & S. 205; *S. C.*, in error, 6 Taunt. 118.

It may be true that the son has not, since he attained his majority, adopted the contract; but the Company must take the consequences of their own deed of settlement, and of their acts, under which, as between Mr. William Litchfield and the Company, he insists the transfer was complete.

Moreover, it does not appear that the appellant ever received any dividends on account of these shares after the date of the transfer to Clayton Litchfield.

Mr. Bacon and *Mr. J. V. Prior*, for the official manager, were not called on.

The VICE-CHANCELLOR:—

How this case would have stood if it had been proved that the Company, or any person authorised to act for the Company in this respect, had, with notice that Clayton Litchfield was a minor, accepted him as a partner, it is unnecessary for me to say. There is no such case of notice here.

The consequence is, that, notwithstanding the singular words in the Company's deed of settlement, referred to by *Mr. Lloyd*, relating to minors being shareholders, whatever may be their meaning, *Mr. Litchfield* the father has not shewn a case in which he has discharged himself of his liability. He remains as liable as he ever was.

Without referring to the question, upon whose account the dividends were received subsequently to the execution of the deed of transfer, and which I think not material, I agree in the conclusion to which the Master has come. It is, I understand, admitted, that Clayton Litchfield, since his majority, has neither admitted himself to be, nor done any act to make himself, liable in respect of these shares (a).

(a) See *Hennessey's case*, post. '91.

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In re
THE
ST. GEORGE'S
STEAM
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CASE.

1850.

Jan. 17th. In the Matter of THE PATENT ELASTIC PAVEMENT AND
KAMPTULICON COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

PRICE & BROWN'S CASE.

Shares were deposited by the allottees with creditors as security, and having been called in were exchanged by the creditors for others in their own names. The fact that they held the shares as security only, was known to the directors of the Company. Upon the Company being wound up:—*Held*, that the creditors had been properly placed in the list of contributories in respect of the shares.

THE Master, in settling the list of contributories to the above Company, placed upon it the names of Messrs. Price & Brown, under the following circumstances:—

Messrs. Price & Brown carried on the business of bill brokers in partnership. In September, 1844, a Mr. Johnstone borrowed of them 19*l*., and deposited twenty shares in the Company to secure the repayment of the loan.

They were, in November, 1845, holders of a bill of exchange for 300*l*., of which a Mr. Green was the acceptor, which would become due in January, 1846, and Mr. Green deposited with them 400 shares in the Company as security for the due honour of the bill at maturity.

In the month of January, 1846, a Mr. Hall was indebted to Messrs. Price & Brown, and deposited 150 shares in the Company with them, as security.

All these shares were for 1*l*. each.

The Company afterwards called in its 1*l*. shares, and issued new certificates of shares for 10*l*. each. Messrs. Price & Brown carried in the above shares, being in all 570, and exchanged them for fifty-seven certificates of shares of the value of 10*l*. each. These certificates were made out in the names of Messrs. Price & Brown.

They also took, in satisfaction of arrears of dividends, four other shares, and paid the sum of 1*l*. 10*s*. as the difference on the account. Thus, sixty-one shares were in all, under these circumstances, standing in their names.

Mr. Brown attended, and took part at a meeting of the

Noar's Case 2 S. & A. 233.

Company in July, 1846; but, with this exception, Messrs. Price & Brown did not interfere in the affairs of the Company.

The directors were cognisant of the fact that Messrs. Price & Brown were the holders of these shares as a security.

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 MENT AND
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 PRICE &
 BROWN'S CASE.

Mr. *Bacon* and Mr. *J. A. Lewis*, in support of a motion that the Master's decision might be altered or varied.—The fifty-seven shares were held by Messrs. Price & Brown only as security; they had only a limited interest in the value of these shares. The depositors of the shares continued entitled to them, subject to the limited interest; they were originally liable, and continued to be so. As to the four additional shares, they were an accretion to the other shares, and Messrs. Price & Brown had only the same limited interest in them that they had in the fifty-seven.

The counsel for the official manager were not called on.

The VICE-CHANCELLOR said, that, for the present purpose, the Master appeared to have held that Messrs. Price & Brown were bound as contributories as much as if they had been the absolute owners in respect of all the shares; and his Honor concurred with the Master in this opinion.

1850.

Ex parte COOKE,

Jan. 26th. In the Matter of THE EASTERN COUNTIES JUNCTION AND
SOUTHBEND RAILWAY COMPANY;

AND

In the Matter of the JOINT-STOCK COMPANIES WINDING-UP
ACTS, 1848 & 1849.

A member of the managing committee of a provisionally registered Railway Company, who had declined to take any shares, and to whom no shares had been allotted, had paid 300*l.* to the solicitor employed on behalf of the Company, for costs.—*Held*, that he was entitled to have the Company wound up.

Where service on a member is sufficient, the affidavit of service need only state that the person served is a member.

THIS was a petition of a member of the managing committee of a Railway Company which had been provisionally registered. It sought the usual winding-up order. No shares had been allotted to the petitioner, who had declined taking any, but he had been obliged to pay 300*l.* to the solicitors employed on behalf of the Company for their costs and charges.

Mr. *Bacon* and Mr. *Daniel* supported the petition.

Mr. *Lloyd* and Mr. *Jessel*, for different respondents, opposed it, and submitted, that, as no shares had been allotted to the petitioner, or agreed to be taken by him, he was not entitled to an order under the Act. They also took a preliminary objection, that the person on whom the petition had been served had not taken any shares.

On referring, however, to the affidavit of service it was found to be therein stated, that the person on whom the service was made was a member of the Company; and the objection was overruled.

The VICE-CHANCELLOR thought, that, to decide that the petitioner was not entitled to have the affairs of the Company wound up would not be giving a proper interpretation to the Act, in the particular circumstances of the case.

The usual order was made.

1850.

In the Matter of THE VALE OF NEATH AND SOUTH WALES
BREWERY JOINT-STOCK COMPANY;

Jan. 31st.

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACT, 1848.

WALTERS' CASE.

THE Master, in settling the list of contributories to this Company, had excluded the name of Mr. Walters.

This was a motion, on behalf of the official manager, that the name of Mr. Walters might be included in the list of contributories for fifty shares of 20*l.* each.

Mr. Buckland was a director and the principal manager of the Company; and, in the year 1840, Mr. Walters, a banker and member of a Banking Company at Bath, consented, on the application of Mr. Buckland, to become a shareholder in and a director of the Company. Mr. Walters' name as a director was inserted in the advertisements of the Company (a).

Mr. Buckland was, at that time, indebted to Mr. Walters in the sum of 1500*l.*, for money lent to him by Mr. Walters; and Mr. Walters agreed to take fifty shares, being the number of shares necessary, according to the terms of the deed of settlement, to qualify him as director, upon an understanding that Mr. Buckland should repay the 1000*l.*, part of the 1500*l.*, in which he was indebted to Mr. Walters, to enable Mr. Walters thereby to pay for his fifty shares.

In a letter to Mr. Walters of the 23rd of January, 1841, Mr. Buckland wrote thus:—

"I have placed fifty Brewery shares in your name as a qualification for directorship."

the transferee effectually became a shareholder as between himself and the shareholders generally.

In a Joint-stock Company fifty shares belonging to the Company were transferred and accepted by the transferee, and an entry of the transaction was made in the share ledger of the Company. By the deed of settlement certain formalities were to be complied with, without which, it was declared that no transfer should have any force either at law or in equity. These formalities had been universally disregarded in the transactions of the Company, and were not complied with in this case:—

Held, that there must be taken to have been a universal consent to disregard the provisions of the deed in this respect, and that

(a) See ante, p. 92.

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This statement was not, however, accurate: the transfer had not then been made; but on the 1st of February, 1841, the accountant of the Company, by Mr. Buckland's directions, opened an account with Mr. Walters in the Company's "Share Ledger," and under that date transferred fifty shares, which had been previously standing in the names of the directors in the same ledger, from the account of the directors to the account of Mr. Walters. He at the same time, and by the same direction, credited Mr. Walters with 1000*l.*, in payment of the shares, and debited Mr. Buckland in a loan account previously opened with Mr. Buckland in the Company's books.

In a letter to Mr. Buckland, of the 26th of March, 1841, Mr. Walters wrote thus:—

"When I agreed to take shares in the Brewery to qualify me for the direction, it was my full intention to pay promptly for the fifty shares, and afterwards, as my monies came in, to take fifty more, and, as I have not kept up to my first intention I feel bound to tell you the reason, which must be in confidence." [He then went on to detail some money transactions in which he had been disappointed, as his excuse for not having paid for the shares, and concludes thus:] "I would not have stated this but for the disappointment it has caused as to my payment for the brewery shares, and I feel sure that you will see it in that light."

On the 3rd of May, 1841, Mr. Walters, in a letter to Mr. Buckland, thus writes:—

"Not having received dividend warrants, I conclude that no shares had been transferred to me; because, if they had, I ought to have received the dividend warrants, and have paid interest until the money was paid for the shares. However, my object in mentioning this is, an impression

that I have strongly on my mind, that, if the shares are not transferred into my name, they had better not be, as I think that I can be of more service to you in not being a shareholder than in being one. It strikes me that our Company [the Banking Company of which he was a partner] will decidedly object to discount for your Company [the Brewery Company] when they know that I am an interested party; and I am much mistaken whether it is not something of this kind that has been at work,—you understand me. I know that I am pledged by promise and agreement; but let me press this on you, and weigh it well, and let me know your opinion. Banking Companies are very jealous on this point, and I confess they ought to be.”

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Mr. Buckland replied to Mr. Walters on the 4th of May, 1841, thus:—

“I did not forward you the dividend warrants, as the transfer was made so near the end of the year [Mr. Buckland here alluded to the Company’s yearly rest, the 1st of March, and the shares having been transferred into Mr. Walters’ name on the 1st of February] that I thought we might as well arrange that when I saw you. . . . I cannot give up the pleasure as well as the advantage of your co-operation as a shareholder and co-director in our Company. Indeed, I have mentioned it in several quarters, and that we merely waited the formality of your being nominated and elected at the general meeting of our Company on the 12th.”

At the annual meeting, on the 12th of May, 1841, Mr. Walters was formally elected a director.

Mr. Walters, in a letter sent by him to Mr. Buckland, of the 26th of May, 1841, wrote as follows:—

“As I understand the matter of the shares, it is as follows: they stood in my name in January, and, as they

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were not paid for, I am indebted to you, or to the firm, (as the case may be,) interest from that time till the time of payment, which payment, if made by the 1000*l* note, will be the 1st September next, the note as dated 29th August, 1840. On the other hand, I am entitled to the dividend lately declared."

The secretary, by direction of Mr. Buckland, retransferred the fifty shares from Mr. Walters' account to the account of the directors, and the 1000*l* purchase-money thereof to Mr. Buckland's account. Mr. Walters' transactions were stated in the Company's share ledger thus:—

<i>Dr.</i> George Walters.					<i>Cr.</i>				
1841. Feb. 1.	To Transfer from Directors on behalf of Company Shares, as under— 3560 & 3609.....	50	1000	.....	1841. Feb. 1.	By W. H. Buckland, Loan Account.....	...	1000	.....
May 31.	To W. H. Buckland's Account .....	...	1000	.....	May 26.	By Retransfer to Directors, on behalf of Company— 3560 & 3609.....	50	1000	.....

The Company, being in want of further capital, had, prior to 1841, created a number of new shares, on which 8*l* per cent. was to be taken as the permanent dividend.

Mr. Buckland, in May, 1841, proposed that Mr. Walters should take some of these shares.

A negotiation followed this proposal, and was mixed up with the correspondence as to the fifty shares; and the above re-transfer of those shares from Mr. Walters to the Company, under the date of May 26, 1841, was made with a view to Mr. Buckland's transferring a similar number of 8*l* per

cent. shares in their stead to Mr. Walters. On the 26th of May, 1841, fifty 8*l*. per cent. shares, then standing in the name of Mr. Buckland in the Company's share ledger, were transferred by the secretary to an account with Mr. Walters in the books of the Company.

On the 16th of June, 1841, Mr. Buckland sent the certificates of the fifty 8*l*. per cent. shares made out in Mr. Walters' name to him; and, at the same time, he sent an account to Mr. Walters, in which credit was given to him at 8*l*. per cent. upon the 1000*l*. from the 1st of February, and debiting him with discount on the 1000*l*. for the same period, thus treating Mr. Walters as having taken fifty 8*l*. per cent. shares on the 1st of February, instead of fifty original shares, which the above accounts represented him to have taken. Mr. Buckland at the same time inclosed to Mr. Walters a cheque for 11*l*. 13*s*. 4*d*., the balance of the account so stated.

On the 18th of June, 1841, Mr. Walters acknowledged the receipt of the 8*l*. per cent. share certificates, and the cheques, and sent to Mr. Buckland his note for 1000*l*. cancelled.

In October, 1841, Mr. Walters became aware that a bill of the Company's had been dishonoured; and, on the 6th of that month, he wrote to Mr. Buckland thus:—

“How greatly I wish that you had candidly told me of your engagements to the North Wilts Bank before I joined you, as I think you ought to have done so; for, although it would have prevented my becoming a partner, yet I could have materially assisted you.”

On the 11th of October, Mr. Walters formally retired from the directorship; and, on the 12th, he addressed a letter to the directors in explanation of the course he had taken, in which he says:—

“My reason for relinquishing all concern in it, as I did yesterday, arose entirely from the position that I fill as di-

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rector in Stuckey's Banking Company, and from a full conviction, which, indeed, I ought to have seen before I joined your Company, that the duties of the two situations could not be impartially carried out."

Upon Mr. Walters' retirement, the fifty shares at 8*l*. per cent. were transferred to the Company, and Mr. Buckland became again indebted to Mr. Walters in 1500*l*.; and, on the 27th of October, 1841, Mr. Buckland remitted to Mr. Walters his acceptance for 113*l*. 11*s*., the amount of several items in account, including therein the following:—

" Half-year's directorship, 37*l*. 10*s*."

On the 14th of April, 1842, Mr. Walters, in a letter to Mr. Buckland, referred to this account, and asked for some explanation of certain items, but making no objection to the credit to him for the 37*l*. 10*s*.

Mr. Walters was examined at great length before the Master, and stated that he never acted as a member of, or attended any meeting of the directors; that his arrangement to take shares was conditional on the previous payment by Mr. Buckland to him of the 1500*l*. due to him; but that the condition had never been performed.

Mr. *Russell* and Mr. *T. H. Terrell*, for the motion.—The facts shew that Mr. Walters consented to become a director of the Company, and that he was held out as such to the public. They also shew that his name appeared in the Company's share ledger as having fifty shares vested in him by transfer from the Company, and that he had been informed of this having been done, and acquiesced in the transaction.

Now, if the shares vested in Mr. Walters, they could not be retransferred to the Company without the consent of every shareholder: *Morgan's case*(a). There your Honor

(a) 1 De G. & S. 750.

was of opinion that the evidence shewed knowledge of the transfer to the Company by Mr. Morgan, and acquiescence by all the members in the transaction; and the *Lord Chancellor* held that the facts did not amount to evidence of such universal acquiescence; but the principle of both decisions is the same. In the present case, no such acquiescence is pretended to have existed, and the retransfer to the Company being invalid, Mr. Walters is still a contributory for all the shares once transferred to him: *Hitchcock's case* (a).

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Mr. *Bacon* and Mr. *Southgate*, for Mr. Walters.—The transfer of shares to Mr. Walters was not perfected, and no shares vested in him. The Company's deed of constitution requires certain formalities to be complied with in the transfer of shares, particularly, that all transfers of shares should be with the approbation of the directors, which, to be valid, must be manifested by entries to that effect in the share register book, under the signatures of two of the directors (b); and without such approbation no transfer to Mr. Walters could have any force, either at law or in equity (c).

In the course of the argument, *Chartres' case* (d), and *Davidson's case* (e), were referred to.

The VICE-CHANCELLOR:—

The only question which, as I view the matter, this motion calls on me to decide, is the question, whether, upon the materials before the Court, it is a just conclusion that Mr. Walters did at one time become a shareholder in this Company. It is, of course, perfectly consistent

(a) *Ante*, p. 92.

(b) See clause 41 of the deed of settlement of the Company, stated at length in *Morgan's case*, 1 De G. & S. 752.

(c) See clause 37 of the Company's deed, *Ib*.

(d) 1 De G. & S. 581.

(e) *Ante*, p. 21.

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with the affirmative of that proposition, to hold that he became a shareholder, and was subsequently discharged in an effectual manner—a point upon which I say nothing, for, I repeat, I do not consider it to be before me.

Then, upon the question, as I view it, I must first of all say, that the evidence appears to me to establish that the fifty shares first mentioned belonged to the Company, and not to any individual member of the Company, at the time when, as it is said, they were allotted to Mr. Walters and accepted by him;—that is the effect of the evidence upon my mind.

Next, I think it established that Mr. Walters did agree to take these shares from the Company—to become the owner of them, and to pay for them. The evidence satisfies me that that intention was carried into effect—that he did take them, and that he did pay for them. The formalities required by the deed may not have been, and I assume them not to have been, strictly attended to, or wholly carried into effect; but, throughout all the transactions that have been brought before the Court by these discussions, it appears that the requisitions and conditions of the deed were (I may say) systematically disregarded; and if you are only to look to the deed,—if you are only to look to the provisions of the deed,—there would be no partnership, and no Company at all, as it seems to me. There must be taken to have been an universal assent, as it seems to me, to disregard its provisions. I think that the Company, acting by agents or an agent sufficient, under the circumstances, for the purpose, did agree to accept Mr. Walters as a member of the Company for fifty shares; that Mr. Walters agreed to that acceptance, and upon it did effectually become a shareholder as between the shareholders, that is, the partners themselves; and so viewing the evidence,—not at all going into the question, into which, as I have said, I ought not to go, whether he ought now to be on the list,—I must refer it back to the Master to review

his report, proceeding, as it does, upon the foundation that he never became a shareholder,—a view which the effect of the evidence on my mind prevents me from taking. The evidence may be added to in the Master's office. The case may assume a different aspect, or it may be shewn, that, though once liable, he has ceased to be so: that may be. At present, all I have to decide is, whether, upon the particular question that I have mentioned, the evidence satisfies my mind that he became a shareholder. I must say that it does.

The order will simply be, to refer it back to the Master, to review his certificate as far as regards Mr. Walters.

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Feb. 11th.

THIS was a motion on the part of the official manager of the above Company, by way of appeal from the decision of the Master, whereby the name of the respondent, Mr. William Marriott White, was included in the list of contributories of the Company, in right of his wife Mary White, a member or contributory in respect of seventy-two shares, with the following qualification, viz. that the appellant was only liable in respect of debts and losses (if any) up to the 11th day of April, 1842; and the motion sought that the respondent's name might be included in

By the deed of settlement of a Company the husbands of female shareholders might become proprietors, with the approbation of the directors. But husbands who did not apply for or obtain such approbation, were within six months after their marriage

to sell their wives' shares, and, on refusal or neglect so to do, were to forfeit the shares for the benefit of the Company. The deed also provided, that if the husband of a female proprietor did not obtain the approbation of the directors to be admitted a proprietor, the directors might, and were required on the application of the husband to, purchase for the Company the shares from him, at the market price, or such price as they should consider reasonable. The husband of a female shareholder attended a meeting and proposed resolutions thereat. He afterwards applied to the directors to be relieved from his wife's shares, and the directors agreed to purchase them, on the husband making an advance to the Company, and taking debentures for the price of the shares, and for the advance. The sale was completed on these terms, within six months after the marriage:—*Held*, that the transaction was valid, and that the insertion of the husband's name on the list of contributories to the Company, was properly qualified by restricting his liability to a period preceding the sale.

Gordon's Case post p. 251.

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the list as a contributory in his own right in respect of the seventy-two shares, without qualification.

The material clauses of the deed of settlement were the following:—

“ 38. Husbands of female proprietors, executors, administrators, or legatees may, with the approbation of the directors, to be manifested as hereinafter mentioned, but not otherwise, be admitted and become proprietors of the Company in respect of the shares which belonged to or were claimed by them as such; but husbands, executors, administrators, or legatees who do not apply for or obtain the approbation of the directors to be admitted proprietors, and also all guardians, committees, or assignees upon bankruptcy, insolvency, or otherwise, shall within six calendar months after becoming entitled to the shares belonging to or claimed by them respectively in such characters, sell and dispose of the same, and on refusal or neglect so to do, shall forfeit the said shares for the benefit of the other proprietors of the Company. Every purchaser or transferee of a share or shares, and every husband, administrator, and legatee, who shall have obtained the approbation of the directors to be admitted a proprietor in respect of the share or shares belonging or claimed by him or her as such, shall, unless already a proprietor in respect of some other share or shares, execute this indenture or some deed of accession thereto, binding himself or herself to conform, to observe, and abide by all stipulations, regulations, and provisions, for the time being affecting or intending to affect the proprietors of shares in the capital and property of the Company; and no purchaser, transferee, husband, executor, administrator, or legatee, unless already a proprietor, shall become a proprietor, or, before executing this indenture or some deed of accession thereto, be entitled in any manner or respect whatever to any of the rights,

privileges, or benefits of a proprietor of the Company, save and except to a proportionate part of the income or proceeds of the capital and property of the said Company upon the next yearly or other division thereof."

41. This is set out in *Morgan's case* (a).

"42. In case any husband of a female proprietor, or any executor, administrator, or legatee, who shall not obtain the approbation of the directors to be admitted as proprietor of the Company, or, in case any guardian, committee, or assignee in bankruptcy or insolvency, shall not be able, within six calendar months from the time of his marriage or of his becoming such executor, administrator, legatee, guardian, committee, or assignee, to sell or dispose of the share or shares belonging to or claimed by him in such character or right as aforesaid, to some other person or persons, to be approved of by the directors as proper to become the proprietor or proprietors thereof, it shall be lawful for the directors in all such cases, and they are hereby required, on the application of the person holding or entitled to or claiming such share or shares as aforesaid, to purchase the same from him or her at the current or market price thereof, or for such other price as the directors shall deem fair or reasonable, or such share or shares so purchased shall, under the order of the directors, be transferred to one of the trustees, on trust for and for the benefit of himself and the other proprietors of the Company."

In the month of June, 1840, Mrs. White, the respondent's wife, then Mary Davis, spinster, became the proprietor of seventy-two shares in the Company. She executed the deed of settlement of the Company dated the 3rd of March, 1840, in respect of the seventy-two shares, but her name was never entered in the share register book. She received the dividends in respect of the shares, which

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were payable on the 1st of September, 1840, 1st of March, 1841, and 1st of September, 1841. In January, 1842, she married the respondent.

In February, 1842, the respondent inquired by letter of Mr. Buckland, one of the directors, how he ought to act in order to avoid responsibility in respect of the shares.

Mr. Buckland, on the 8th of February, 1842, wrote the following letter in reply to the inquiry:—

“ In reply to your favour of the 5th instant, our deed of settlement expressly provides for the cessation of shareholders’ responsibility on the registered transfer of shares. It is not necessary to offer the shares in the first instance to the Company, but the directors’ consent is necessary to the transfer of shares, but which consent would not of course be withheld, unless for extraordinary and unlikely reasons. Indeed, it is obviously the Company’s interest to give every reasonable facility to transfers. As to the Company purchasing the shares to which you refer, we have had several letters from Mr. Stroud, of Swansea, on this subject, relative to the shares you offer, to which correspondence we beg to refer you.”

The appellant then had an interview with Mr. Buckland, and afterwards wrote to the directors as follows:—

“ Bristol, 3rd March, 1842.

“ Gentlemen,—When I had the pleasure of seeing you last week, at Neath, I made you acquainted with the obligation I am under with my partner in the wine and spirit business, of not being engaged in partnership in any other concern. As you are aware of the circumstances which have led to my connexion with the Brewery, may I beg the favour of your assisting (under those circumstances) in relieving me from being a shareholder. I doubt not, in the present want of capital of the Company, this

request is not so convenient as it otherwise might be, and that, therefore, I must make a sacrifice; but, having no choice in the matter, I leave myself in your hands, trusting you will do the best for me in your power, and as early as possible. Waiting your reply,

"I am, Gentlemen,

"To the Directors of the Vale of Neath Brewery Company. Yours most respectfully,
"W. WHITE."

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Mr. Buckland, on behalf of the directors, answered this letter as follows:—

"Vale of Neath Brewery, Neath,
March 5, 1842.

"My dear Sir,—In reply to your favour of the 3rd instant I need not assure you that we have every disposition to assist you in any way in our power; but I think you will see the inconsistency of the directors entrenching upon the capital of the Company at the very time when the shareholders, at the suggestion of the directors, decide upon increasing the capital. You can very easily obviate the difficulty as regards your stipulation with your partner, by having the shares put into the name of a friend, (which will, probably, be the best course for you to adopt,) until the Company cease to issue fresh shares; after which, the directors would render every assistance to a shareholder wishing to sell, by seeking for a purchaser or by buying on behalf of the Company. I am very glad the advertisement in the Cambrian, of seventy-two shares for sale, is discontinued, as it was operating much to the prejudice of the Company."

The respondent replied as follows, on the 7th of March, 1842:—

"I am favoured with yours of the 5th instant. I would prefer taking a debenture from you at 6l. per cent. for the

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seventy-two shares, rather than ask any friends to have them transferred in their name. I do not know the time you purposed to issue the debentures at, and will thank you to let me know. This mode would not interfere with the capital for some time, until you were in a condition when it would not incommode you."

An agreement was accordingly entered into for the purchase by the directors, on behalf of the Company, from the respondent, of the seventy-two shares at 20*l*. per share, provided the respondent would advance, by way of loan to the Company, 260*l*., and would take the debentures of the Company, payable three years after date thereof, with interest in the meantime, as a security for the 260*l*. and for the purchase-money for the shares, amounting to 1440*l*., making in all 1700*l*.

The purchase was completed on these terms on the 11th of April, 1842, when the respondent advanced the 260*l*., delivered up to the directors the certificates of the shares, and received from them debentures of the Company, dated the 11th day of April, 1842, for several sums amounting together to 1700*l*., payable three years after the date thereof, with interest in the meantime. The debentures were duly signed by three of the directors.

No deed of transfer of the shares was, however, executed.

A dividend was declared in June, 1842, on the shares, and the respondent and his wife received the proportionate part of the dividend up to the 11th of April, 1842, but they never received any further dividend or other benefit in respect of the shares.

The interest upon the debentures was paid by the Company, and at the expiration of the three years they were exchanged for the promissory notes of the Company for 1700*l*., payable at six and twelve months. The whole of the 1700*l*., except 400*l*. which had since been paid off, still remained due, with an arrear of interest on the security of these promissory notes.

On the 27th of October, 1843, the directors delivered to the respondent the following document relating to the sale of the shares:—

“ William White, of Bristol, Gentleman.

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	<p>“ 11th April, 1842.</p> <p>“ Sold to the Directors, on behalf of the Proprietors, Seventy-two Shares, Nos. 31 to 60, 2491-2, 3540 to 3559, and 3490 to 3509.</p> <p>“ W. H. BUCKLAND, “ JOSEPH RUSHER.</p>	
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“ We hereby certify that the above is a true extract from the Share Book of the Vale of Neath and South Wales Brewery Company.

“ Dated this 27th day of October, 1843.

“ W. H. BUCKLAND, }
“ JOSEPH RUSHER, } Directors.

“ WILLIAM LOWTHER, Secretary.”

The respondent attended an extraordinary general meeting of the proprietors of the Company, held on the 23rd of February, 1842, and proposed three of the resolutions then carried. One of these three resolutions was, that all payments of the Company should be made in cash, and that the business should be so conducted as to be exempt from all current liabilities. Another was, that an instalment of 5*l*. per share should be payable within two months, on certain additional shares which it had been previously resolved should be taken by the proprietors, in order to insure the early introduction of a considerable portion of the unpaid capital. The last of the three resolutions pro-

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posed by the respondent was for a vote of thanks to the chairman (a).

Mr. *Russell* and Mr. *T. H. Terrell*, in support of the motion.—In the first place, the respondent is liable personally, and not merely in right of his wife. His attending a meeting, and proposing resolutions, and other acts, were sufficient to constitute him a shareholder in his own right; and it is evident that he so considered the matter himself, when he wrote the letter of the 3rd of March, asking to be relieved from his liability. The omission of an entry of his name on the share register book does not exempt him, for it is clear that there was an universal waiver and nonobservance of this rule of the deed of settlement (b). The wife's own name was never so entered. Upon this part of the case we submit that the qualification "in right of his wife" is wrong, so far as regards liabilities incurred during the period subsequent to the marriage.

Next, the liability ought not to be limited to the 12th of April, for the sale to the directors on that day cannot be sustained. *Morgan's case* (c) decided it was contrary to the duty of the directors to enter into an agreement for withdrawing the capital of the concern, and for converting a person who was liable to contribute to the Company's debts into a creditor of the Company, by giving him debentures. Reliance will be probably placed upon the 38th and 42nd articles (d) of the deed of settlement; but the parties to the sale of April 12th never brought themselves within those provisions. Those clauses were intended to provide for the case of the husband of a female shareholder being a person of whom the directors did not approve. Now, it is quite clear from the correspondence, that the agreement between Mr. Buckland and the respondent did

(a) There was nothing in the admissions or evidence as to the respondent's having actually voted. But probably there was no

formal voting.

(b) See the preceding case.

(c) 1 De G. & S. 750.

(d) Ante, pp. 158, 159.

not proceed upon any notion of want of approval of the latter as a shareholder, but was entered into at his desire, for the purpose of relieving him from his liability. The provisions contemplate two alternative events:—one, the rejection of the husband by the Company, for which case—as he would then be in no default—it is reasonably provided that compensation shall be made to him, by his having permission to sell his shares, and being entitled to call on the directors to purchase them. The other case contemplated by the deed is when the husband is in default, by not making an endeavour to sell the shares or to obtain the directors' approbation to his holding them. The provision for this event is not purchase, but forfeiture. The transaction relied upon as a sale in this case, falls within neither of these provisions, but is simply an agreement unauthorised by the deed, and open to the objections which were held fatal to a similar proceeding in *Morgan's case* (a). Moreover, the directors were by the deed only empowered to purchase at the market price, or at such price as they might think reasonable. Now, it is not alleged that the money agreed to be paid was the market price; nor, having regard to the terms of the contract, can it be supposed to have been, nor is it stated, that there was any meeting of directors to decide what it would be reasonable to give for the shares: Mr. Buckland alone acted. A further objection, which is of itself sufficient to invalidate the transaction, is, that the power of the directors to purchase is only given in the event of the husband of a female shareholder being unable to sell his wife's shares within six months after his marriage; and, therefore, it could not be exercised till the expiration of that period, nor unless it appeared that the husband had been unable to sell the shares during the period, neither of which conditions were here fulfilled. The shares have never been transferred from Mrs. White's name; and, therefore, the respondent must continue liable.

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(a) 1 De G. & S. 730.

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Mr. *Bacon* and Mr. *Toller*, for the respondent.—It was clearly competent for the directors, under the 38th, 41st, and 42nd clauses (a) of the deed of settlement, to purchase Mrs. White's shares on behalf of the Company. And the deed empowers them to use their discretion as to the terms of the purchase. There is nothing to shew that they did not soundly and properly, or, at all events, honestly exercise this discretion. They could not declare the shares forfeited till after six months. In the meantime, they might make such bargain as might appear to them advisable. It was not necessary that they should disapprove of the respondent as a shareholder: their forbearing to approve of him, for any reason, was sufficient to entitle him to require them to purchase the shares. And as to his name being inserted as liable in right of his wife, it could be entered in no other way. He did nothing to incur further liability than that to which his position of husband of a female proprietor subjected him.

Mr. *Russell*, in reply.

Feb. 11th. The VICE-CHANCELLOR:—

The argument, as continued to-day, has not changed the impression which I had of this case at the rising of the Court on Saturday. The motion must be refused by me, if, in my opinion, Mr. White ought not to be on the list of contributories without the presence there of his wife also, or is placed there in a manner fully as prejudicial to himself as can be proper, or ought not to have been placed there at all. But I think that he stands in one of those predicaments, and, therefore, that I cannot accede to the motion.

The purchase from him by the directors of the shares in question on behalf of the Company, was a transaction which the 42nd clause of the deed of settlement in a possible state of circumstances justified and authorised. The

(a) Ante, pp. 158, 159.

appellant, admitting the possibility of that state of circumstances, contends that it did not exist, and that, consequently, the transaction was not justifiable, was irregular, and was void. If his premises are to be taken as true, I assume his conclusion to be correct. But are his premises to be taken as true? In my opinion the burthen is upon him who impeaches the purchase, to prove them, and to shew that, though it might have been a transaction regular and in due course, it was irregular and out of due course. He has, in my opinion, failed to do so. I am not satisfied upon the evidence, that Mr. White did, either in form or substance, obtain or apply for that approbation of the directors which is mentioned in the 38th, and 41st, and 42nd clauses, or that a state of things had arisen which precluded the applicability of the 42nd clause to these shares. It seems to me that, if, at any time before the purchase, the directors had discovered Mr. White to be, instead of a respectable and solvent man, a person of a very different description, they were at liberty to reject him as a proprietor; and the question, whether the parties to the contract had the 42nd clause actually in view, seems to me unimportant, if that, in fact, took place which the clause authorised. On the whole, I cannot see sufficient ground for disturbing, at the instance of the official manager, what the Master has done with respect to Mr. White, especially as, upon the assumption of the purchase being unsustainable, the motion ought not, I think, to succeed, unless he was effectually approved, and effectually admitted, as a proprietor.

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This decision was affirmed, on appeal before the *Lord Chancellor*, on the 3rd of March, 1850 (a).

(a) The reporters have been favoured with the following note of his Lordship's judgment:—

The LORD CHANCELLOR.—It appears to me, taking these two clauses together, the 38th being necessary to be thoroughly under-

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stood in order to understand the 42nd, that the *Vice-Chancellor* has come to a right conclusion. By mixing up matters that are in no way connected together, a great deal of confusion is produced in the language, but, coupling it with that which is the subject of the present question, it is perfectly clear; the fact being, that the husband of a female proprietor of shares not having applied to be admitted, not having obtained the approbation of the directors, and not having sold, entered into an agreement within six months, in April, 1842, by which, under the authority of the Company, he, by a note or memorandum, sold to the directors, on behalf of the proprietors, 22 shares, enumerating them. There is a contract for sale, and an actual transfer—a contract for sale or a memorandum of sale by the proprietor to the Company; and the objection now stated is this, that the transaction took place before the expiration of six months from the marriage. Now, nothing can be plainer, I think, than the purport of these two sections; but what is mainly to be looked to is the provision of the 38th section, for that describes what it is that the husband of a female proprietor is to do. The husband of a female proprietor may, with the approbation of the directors, to be manifested as therein mentioned, but not otherwise, be admitted and become a proprietor of the Company, in respect of the shares which belonged to or were claimed by him as such. But husbands who do not apply for or obtain the

approbation of the directors to be admitted proprietors, are within six calendar months after becoming entitled to the shares, to sell their shares, and, on refusal or neglect so to do, are to forfeit the shares for the benefit of the other proprietors of the said Company. I adhere to the construction of the word forfeit, which I put on that word in the first instance. And my observation upon it was, that it would be an absurdity to suppose that the Company, after the expiration of six months, would pay for that which they had the means of obtaining without payment. Whether the word was forfeit or merge, was, for that purpose, the same thing. Therefore, giving the word forfeit the meaning which the learned counsel wishes to give it, the objection is fully answered. That is the provision of the 38th section; but still there was one matter to be provided for. There are two modes prescribed by which the husband of a female proprietor is to get rid of the shares or to deal with the shares. He is either to be admitted as a proprietor in right of the shares to which he became entitled in right of his wife, or he is to have six months to sell them. The Company will not permit that sort of interest to remain outstanding after the expiration of six months, and therefore it gives him six months, after which the shares are to be forfeited.

Then the 42nd section says, "In case any husband of any female proprietor shall not obtain the approbation of the directors

to be admitted a proprietor of the Company, or shall not be able, within six calendar months from the time of his marriage, to sell, then, it shall be lawful for the directors in all such cases, and they are hereby required, on the application of the person holding or entitled to or claiming such share or shares as aforesaid, to purchase the same," according to the mode prescribed.

Nothing is more obvious than that it could not be necessary for the purchase to be postponed until after the expiration of six months. I do not say the directors, if so minded, are precluded from entering into it after the expiration of six months, but it cannot be contended that that is not to be a matter of negotiation and purchase within a period of six months. On the contrary, the intention must be, that, the party not having made up his mind to be a proprietor himself, or to sell his shares, but preferring to deal with the Company, they should, as between themselves, have recourse to that last scheme of getting rid of the shares which belonged to the wife.

There is no obligation on the party to concur in it; there is nothing compulsory; there is liberty reserved to him of vesting in himself the beneficial interest in the shares belonging to the wife, which he may do by either of the two modes prescribed. If he does not by either of those two modes, there is the third; the third has

arisen, and the directors have purchased.

How it can be contended that the case of *Morgan* has any reference to the present, I cannot understand. The case of *Morgan* proceeded on the misapplication of trust funds. There was a certain mode prescribed to the Company by the deed, under which they were to administer the trust funds. In a certain event they had a power of buying shares, and that power not having arisen, they could not justify what they had done under that provision. Then, if they did not buy, and buy under that provision, they had other duties to perform, and other modes of application were prescribed. I was of opinion, the event not having arisen, and the deed not authorising them to purchase, they were misapplying the trust fund in purchasing shares of other proprietors. Therefore I thought, on that ground, that what was attempted could not be justified. I justify and confirm this transaction, because it is, in my opinion, precisely within the terms of the deed. The great difference between that case and the present is this, that there I objected to the purchase because it was not authorised by the terms of the deed; and I confirm it here because I conceive that it is within the terms of the deed.

It appears to me, therefore, that the *Vice-Chancellor* has come to a perfectly right conclusion, and that this application must be dismissed, with costs.

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Feb. 22nd.

In the Matter of THE WARWICK AND WORCESTER RAILWAY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848.

PELL'S CASE.

The 28th section of the Joint-stock Companies Winding-up Act, 1848, providing that, immediately after the appointment of an official manager, the Master shall direct that all deeds, &c., belonging to the Company shall be delivered up by every person in whose custody they may be, only authorises the Master to make a general order, and does not empower him to make, *ex parte*, an order directed to a particular individual to deliver up documents in his custody.

THIS was a motion to discharge an order of January 15, 1850, made by Mr. *Blunt*, the Master charged with winding up the above Company, whereby it was ordered, that George Pell should, on or before the 23rd day of January inst., or within seven days after service thereof, deliver up to Henry Ernest, the official manager of the Company, a certain indenture bearing date the 10th day of October, 1845, being or purporting to be the parliamentary contract of the above-mentioned Company; and also a certain other indenture bearing even date with the first-mentioned indenture; and also all deeds, books, papers, and writings of and belonging to the said Company, in the custody, possession, or power of the said George Pell.

The order had been made on an *ex parte* application.

Mr. *Malins* and Mr. *Winstanley*, in support of the motion, contended, that the Master had no jurisdiction to make the order *ex parte*.

The VICE-CHANCELLOR desired to hear the case argued first on that question.

Mr. *Russell* and Mr. *Baggallay*, for the official manager, contended, that the Master had jurisdiction under the 18th section of the Act of 1848, providing, "that immediately after the appointment of an official manager, the Master shall by order direct that all the books of account,

deeds, instruments, cash, bills, notes, papers, and writings of and belonging to the Company, shall, within a time to be limited in that behalf, be delivered up, and the same shall accordingly be delivered up, by every person in whose possession, custody, or power, the same may be, to the official manager, and shall be kept by him; and upon and immediately after the appointment of any new official manager, all the same matters shall be in like manner ordered to be delivered over to him; provided, nevertheless, that it shall be lawful for the Master from time to time, and at any time, to make such order as he shall think fit, relative to the custody or deposit, either absolutely or only for a time, of such books of account, deeds, instruments, bills, notes, papers, and writings, or any of them." They also referred to the 66th section of the same Act (a).

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AND WORCES-
TER RAILWAY
Co.
PHILL'S CASE.

The VICE-CHANCELLOR:—

I observe that this order is specifically an order upon a person named,—not a general order. Now, on looking at the two sections which have been cited to me, there is an observable difference between them. The 66th section, which relates to any sum or balance, books, papers, estate, or effects, in the hands of any contributory trustee, receiver, banker, or agent, commences thus: [His Honor read the beginning of the clause (a).]

In the other section (the 28th) the words are: [His Honor read them.] It appears to me that the object of those who framed the 28th section, and of the Legislature in passing it, must be taken to have been, that a general direction should be given at the outset of the proceedings in the Master's office, and that the section was not intended to be directed against any particular individuals. I do not think the Act ought to be so interpreted (without absolute necessity, and I do not see any such necessity) as

(a) See the clause set out, ante, p. 106.

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 In re
 THE WARWICK
 AND WORCES-
 TER RAILWAY
 Co.
 PELL'S CASE.

to render a person liable to an ex parte order of this kind in derogation of private rights. Therefore, with great deference and respect for the Master's opinion, as well as the opinion of the other Masters who have been consulted, I must decide that the order in question, which has been made entirely and in every respect ex parte, and directed specifically against a particular person, must be discharged.

The costs of both parties must come out of the estate.

Feb. 8th & 23rd. In the Matter of KOLLMANN'S RAILWAY LOCOMOTIVE AND CARRIAGE IMPROVEMENT COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.

ELLIS'S CASE.

The Master has jurisdiction to order substituted service of an order upon a contributory for payment of a call.

Form of such an order.

AN order had been made on the 22nd of January, 1850, by Mr. *Kindersley*, the Master acting in the winding up of the above Company, that Jane Ellis, one of the contributories, should, within seven days after the service of the order, pay to the official manager, at his office, the sum of 276*l*, such sum being the balance appearing due from the said Jane Ellis on her account with the Company. Mrs. Ellis was confined to her room by illness, and it appeared from a medical certificate that the excitement which might be produced by the service of the order personally upon her would probably be attended with danger to her life.

Under these circumstances the official manager applied to the Master for leave to effect the service of the order on Mrs. Ellis, by serving a copy of it on Mr. Arthur Chandler, the solicitor appearing before the Master for and on behalf of her in this matter, and by serving another copy on Gilbert Bolden, another solicitor also acting for and

on behalf of Mrs. Ellis in this matter, and by serving a copy of the order on the dwelling-house or place of residence of Mrs. Ellis, at No. 49, Bedford-square, Brighton; that such several services be deemed good service of the said order on Mrs. Ellis, for all intents and purposes whatsoever; and that service of the said order be considered as having been duly effected on the said Jane Ellis when the last service thereof, as before mentioned, should have been made.

The Master certified, that, having considered the various clauses, powers, and authorities in the said Acts respectively contained, he did not think fit to make such order, not considering that he had jurisdiction in that behalf given him by the Acts.

Mr. *Glasse* now applied to the Court for an order, and stated that the Master had expressed his willingness to make the order if his Honor thought that the Master had jurisdiction.

The VICE-CHANCELLOR said, that, in his opinion, the Master had jurisdiction under the 46th section of the Joint-stock Companies Winding-up Act, 1848, which empowers the Master to order the service on any person, in such manner as he shall think fit, of any order or proceeding in and about the winding up of the affairs of any Company under the Act.

The following order was made by the Master, the form having been discussed and settled in the Record Office.

“ February 23rd, 1850.

In the Matter of the Joint-stock Companies Winding-up Act, 1848, and of Kollmann's Railway Locomotive and Carriage Improvement Company.

WHEREAS, by an Order made by me in this

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AND
CARRIAGE IMPROVEMENT Co.

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ELLIS'S CASE.

matter on the 22nd day of January, 1850, it was ordered, that Jane Ellis, one of the contributories of the said Company, should, within seven days after the service thereof, pay to the official manager of this Company, at the office of the said official manager, at No. 20, Paternoster-row, in the city of London, the sum of 276*l*, such sum being the balance appearing due from the said Jane Ellis on her account with the said Company. Now, upon the application of William Goodchap, the said official manager appointed in this matter, and upon reading the affidavit of the said William Goodchap, sworn before me this 23rd day of February, and filed on the file of the proceedings in this matter in my office, I do order that service of the said recited order upon Mrs. Jane Ann Christian Nicolay, the daughter of the said Jane Ellis, at the residence of the said Jane Ellis, situate at No. 29, Bedford-square, Brighton, in the county of Sussex, and upon Arthur Chandler, of No. 22, Paternoster-row, in the city of London, and Gilbert Bolden, of 44, Craven-street, Strand, in the county of Middlesex, gentlemen, the solicitors acting for and on behalf of the said Jane Ellis, be deemed good service of such order upon the said Jane Ellis (*a*).

"R. T. KINDENSLEY."

(*a*) See the Joint-stock Companies Winding-up Act, 1848, sections 46, 67, and 87. The Mas-
ter, in making the above Order, deemed it expedient that the services should be made on Mr.

Chandler and Mr. Bolden, as the solicitors of Mrs. Ellis, from the circumstances disclosed by the affidavit of the official manager, and not as being necessary or expedient in other cases unattended by such circumstances, where one

substituted service might be sufficient.—The reporters are indebted for the above note, as well as for the form of the Order, to Mr. Berrey, Clerk of Records and Writs.

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KOLLMANN'S
RAILWAY LOCO-
MOTIVE AND
CARRIAGE IM-
PROVEMENT CO.
—
ELLIS'S CASE.

BERESFORD'S CASE.

Feb. 21st.

THIS was a motion on behalf of the official manager of the above-named Company, that the name of the respondent, Francis Marcus Beresford, might be included in the list of contributories, Mr. *Kindersley*, the Master charged with the winding up of the Company, having excluded him under the following circumstances:—

In the month of June, 1844, a number of gentlemen met together for the purpose of forming a Company to carry out an invention of the late Mr. G. Augustus Kollman, for the improvement of railway locomotives and carriages.

At this meeting a provisional committee were elected.

On the 19th of June, that committee resolved that the capital should be 10,000*l.*, which should be raised by 20*l.* shares, and that an immediate deposit of 2*l.* per share should be paid by parties taking them.

On the 30th of July, 1844, five shares were allotted to the respondent, pursuant to his application, numbered respectively from 122 to 126, inclusive. On the 7th of August, 1844, the respondent paid into the bankers of

The deed of settlement of a Company purported to be made between persons referred to and described as being named in a schedule, of the first part, and persons named and described, of the second and third parts. There was no schedule to the deed, which, however, was executed by numerous persons besides those of the second and third parts. One of the clauses authorised the directors to declare forfeited the shares of any party to the deed who did not execute it; and another

clause directed that, on a transfer, the transferee should take on himself the antecedent liability of the transferor. An allottee of shares paid his deposit and some calls, but did not execute the deed. The directors declared his shares forfeited, and carried them to the Company's share account, and he submitted to the forfeiture. On the affairs of the Company being, several years afterwards, wound up, under the Joint-stock Companies Winding-up Acts, the Master excluded the allottee from the list of "contributories," holding that he was virtually a party to the deed, so as to enable the directors to forfeit his shares under its provisions; and that the forfeiture relieved him from responsibility in respect of losses accruing before it was declared. The Court, on appeal, affirmed the decision.

aff'd 24 & 25 SEP.

Kollman's Case
3 Dec. & J. 172.
Beresford's Case
4 Feb. & J. 50.

1850.

In re
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BERESFORD'S
CASE.

the Company the sum of 10*l.*, as his deposit of 2*l.* per share.

A share register was kept by the Company, in which the respondent's name was entered as a shareholder, as follows:—

NAME.	Residence.	No. of Shares applied for.	Number allotted.	Number of Shares.	Deposit.
Francis Marcus Beresford	Newcastle	5	5	122 to 126	£ 10

Again, on the 9th of February, 1845, Mr. Beresford paid 15*l.* as an instalment thereon of 3*l.* per share.

On the 18th of March, 1845, a deed of settlement was executed. It purported to be made between the persons therein referred to, as being described in a schedule, of the first part, and certain persons whose names and descriptions were set out, of the second and third parts. It was executed by a large number of persons, besides those who were parties of the second and third parts; but there was no schedule.

On the 3rd of June, 1845, the respondent paid a further instalment of 3*l.* per share on his five shares, making in all 40*l.* which he had paid on account thereof, and leaving a balance of 60*l.* still due from him to the Company.

The following were the clauses of the deed of settlement principally referred to:—

Article 93. "That no share shall be transferred, except by an instrument in such form, and according to such regulations, as shall from time to time be prescribed and made by the board of directors; and every such instrument shall contain proper covenants and agreements, to be entered into upon the part of the intended transferee with the trustee or trustees for the time being of the said Company, whereby such transferee shall take upon himself or herself,

and become subject to, all contracts, duties, and liabilities, which in respect of the transferred share or shares shall subsist in or attach to the disposer of the same in respect thereof, or to which the disposer thereof would have been subject and liable on account thereof, in case no such disposition of the same had been made."

Article 105. "That, if any of the several persons parties hereto, or whose names are mentioned in the schedule hereunder written, or either of them, shall neglect or refuse to execute these presents on or before the 18th day of April next ensuing, it shall be lawful for a board of directors at any time thereafter to declare in writing the share or shares of the person or persons who shall so neglect or refuse as aforesaid, or any of them, forfeited to the Company; and, in that case, the share or shares so declared to be forfeited shall be actually forfeited, and shall thenceforth belong to the Company, freed and discharged from all right or interest therein of the person or persons previously entitled thereto, anything hereinbefore contained to the contrary thereof in anywise notwithstanding."

The respondent never executed the deed, although required to do so; and, in consequence of this omission, it was resolved, on the 19th August, 1845, at a meeting of the directors of the Company, "That F. M. Beresford, Esq., be informed, that if he does not sign the deed of settlement of Kollmann's Company previous to the 25th instant, his shares will be forfeited under clause 105 of the deed."

In accordance with this resolution, a letter was, on the 19th of August, 1845, written and sent by the secretary of the Company to Mr. Beresford, inclosing a copy of the resolution.

On the 26th of August, 1845, the respondent made a communication to the Company in answer to the secretary's letter to him, and with reference to other matters

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mentioned in that letter, but he in no way alluded to the resolution of the board as to the forfeiture of his shares for non-execution of the deed.

By a resolution passed at a board of directors on the 26th of August, it was resolved that Mr. Beresford's five shares be forfeited, in consequence of his not having signed the deed of settlement.

On the forfeiture of the shares they were transferred to the Company's share list; and in the share account, under date the 29th day of August, 1845, the entry of the forfeiture was made thus:—

“Forfeiture of F. M. Beresford's shares, cancelled for nonpayment of call. Numbers 228 to 232.”

The cause of forfeiture was, by mistake, wrongly stated. The numbers of the shares were also inaccurate.

At the time when the shares were declared forfeited the Company were indebted in various sums of money, some of which still remained unpaid, together with the other debts since contracted.

From the 26th day of August, 1845, to the present period, Mr. Beresford had not paid any sum or sums of money to the Company, or to any person on its behalf, for or in respect of the shares, nor had he in any way claimed any right or interest in respect thereof.

The Master was of opinion, as to the imperfection in the deed, that the persons who were intended to be included in the schedule were allottees of shares; and that, therefore, the 105th clause, although in fact there was no schedule, ought to operate with respect to all persons who were allottees of shares; and that it would have been a great injustice to the Company to say, because there happened to be no schedule, they had no power of forfeiture, except as applied to the managers.

With respect to the effect of the forfeiture, the Master said, that the only question was, whether, when there was

a clause of forfeiture duly acted upon by the directors, and nothing said about the existing obligations, the forfeiture was to have the effect of discharging the shareholder altogether; and that, frequently, the case was provided for by an express clause, that the shareholder was not to be exonerated from his liability up to the time of the forfeiture; but that the provision at the end of the 105th clause of this deed, although ambiguous, rather tended the other way. After hearing the question discussed, the Master said, that in his opinion the clear and just view of the case was this, in the absence of any clause on the subject, that where the Company chose to forfeit any shares for the non-execution of the deed, or for nonpayment of calls, the effect was to put the Company in the situation of the original proprietor, and exactly in the same position as a transferee of those shares would have been in; and that, in the absence of any such clause as the Master had adverted to, not only was the right to profit gone, but the liability to pre-existing debts or losses also.

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Mr. Bacon and Mr. Glasse, for the official manager.—The 105th clause of the deed had no application to the respondent, for he was not named in any schedule to the deed, nor was he a party to it. The directors had, therefore, no power given to them by the other shareholders to declare the respondent's shares forfeited; and *Morgan's case*(a) decided, that, to make it binding on the shareholders, universal assent to it must be proved, of which there is no evidence in this case. As between himself and the general body of his fellow shareholders, the respondent remains liable, and his name ought to have been inserted on the list. At all events, the forfeiture, if authorised, could not exonerate him from liabilities which he had then incurred. No provision in the deed gives the directors any power so

(a) 1 De G. & S. 750.

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to exonerate a shareholder, nor does it even appear that any such exoneration was intended by the parties.

Mr. *Daniel*, for the respondent, was not called upon.

The VICE-CHANCELLOR:—

It is not alleged that the resolution of the directors was fraudulent, colourable, or collusive; nor was it in contest before the Master, whether the forfeiture was accepted or submitted to by Mr. Beresford. On the contrary, the whole contention before the Master proceeded upon the assumption that the declaration of forfeiture had been accepted and submitted to. In such circumstances it would be too much to say, as against Mr. Beresford, that the question can now be raised, whether the directors did or did not act with strict and perfect regularity in taking that step. I agree with the Master in the conclusion to which he has come. Perhaps, if it were necessary to say so, I should agree in the steps by which he arrived at that conclusion. The motion must be refused, with costs.

Feb. 23rd. In the Matter of THE TRING, READING, and BASINGSTOKE RAILWAY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP Act, 1848.

COX'S CASE.

The share-
 brokers of a pro-
 visionally-regis-
 tered Company,
 who were also
 holders of

shares, and had signed the Company's deeds, borrowed of the directors part of the Company's monies, to enable them to complete a large purchase of shares in the market, and deposited as a security the purchased shares and some of their original shares:—*Held*, that the monies borrowed were not due from them as members and contributories of the Company, so as to authorise the Master summarily to order them, in that character, to pay the amount under the 66th section of the Joint-stock Companies Winding-up Act, 1848.

THIS was a motion to discharge an order made by the Master, directing the appellants, William Cox & Henry Poore Cox, to pay 6300*l*.

Expte. Hartman, J.L. 12, 4. Ch. 790

The Company was projected and provisionally registered in 1845, and the appellants were appointed by the provisional directors to be its sharebrokers. They were also allottees of shares, and signed the Company's deeds.

In October, 1845, the appellants and some other persons agreed to purchase 1200 shares in the market; and the appellants applied to the directors, and requested them to advance a portion of the purchase-money on the security of the shares. After considering the application, the directors agreed to advance 6300*l.*, upon a deposit of the 1200 purchased shares, and a further deposit of 155 shares, which had been regularly allotted to some of the purchasers. The money was accordingly lent, and the shares deposited. The cheque with which the advance was made, was signed by the chairman and two of the directors, in the usual way, and was paid out of the deposits. A memorandum was at the same time signed; but, as it contained an undertaking to pay at a fixed time, and was not stamped, it was objected to, and not received in evidence.

The appellants afterwards wrote and addressed the following letter to Major Lindam, the chairman of the Company:—

“ 16, Throgmorton-street, 7th November, 1845.

“ Dear Sir,—Twelve persons, to whom the Tring and Reading Shares you hold belong, are desirous of keeping them, if you will kindly let the loan go on for one more month only; but, if you require them to pay you on the 14th, we must give each of them as early notice as possible of it. The consequence of your refusal to comply with their request must be that we shall have instructions to force them on the market, and as many more which they now hold, that were allotted to them originally.

“ They have every confidence in the management and future success of the undertaking, and would be most re-

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luctantly compelled to make a great sacrifice, if you decline granting this application.

"We are, dear sir, yours faithfully,

"To MAJOR LINDAM,

"W. & H. P. Cox.

"Chairman, &c., &c."

In February, 1846, the appellants received the following letter from Mr. Hill, the solicitor to the Company:—

"Soho-square, 5th February, 1846.

"Dear Sir,—Your obligation, dated the 28th day of October, 1845, for the sum of 6300*l*. and interest having become due some time past, I am necessitated to call your attention to the subject, and shall be glad to see you early next week, to talk the subject over, so that your convenience, and that of your friends, may be consulted as much as possible.

Yours truly, GEORGE HILL.

"Messrs. W. & HENRY P. Cox,

"Brokers, Throgmorton-street."

Mr. Hill was examined before the Master, and deposed that the directors agreed to lend the appellants 6300*l*. upon a deposit of scrip, and that an interview took place between the appellants and Mr. Hill, in order to arrange the terms of the loan and the payment of the money to them.

The arrangement, according to the evidence of Mr. Hill, was, that the appellants were to deposit 1400 shares in the Company, and to repay the money in one month, with interest at 5*l*. per cent.

Other evidence was gone into; and the Master, on the 1st of February, 1850, made the order now in question, and thereby found, that, on the 28th day of October, 1845, the sum of 6300*l*., part of the monies of the said Company, was lent and advanced by or on behalf of the said Company to them the said William Cox & Henry Poore Cox, as members or contributories of the said Company;

and that they agreed to repay the same to the said Company, with interest at the rate of 5*l.* per cent. per annum from the 28th day of October, 1845; and that the said principal sum of 6300*l.*, together with interest thereon after the rate aforesaid from the said 28th day of October, 1845, still remained due and owing from the said William Cox & Henry Poore Cox as such members and contributories as aforesaid to the said Company; and the Master thereby ordered, that the said William Cox & Henry Poore Cox and each of them should pay to William Charles Wryghte, the official manager of the said Company; at his office, No. 4, Sambrook Court, Basinghall-street, in the city of London, on the 1st day of March, 1850, the principal sum of 6300*l.* together with the further sum of 1365*l.* for interest thereon, after the rate of 5*l.* per cent. per annum from the said 28th day of October, 1845, up to the said 1st day of March, 1850. The Master thereby also certified that he found the said sum to be a sum in the hands of the said William Cox & Henry Poore Cox, to which the said Company was *primâ facie* entitled, and to be a sum which it was necessary should be paid by the said William Cox & Henry Poore Cox as such members and contributories as aforesaid, in order to the winding up of the affairs of the said Company.

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 THE TRING,
 READING, AND
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 RAILWAY CO.
 COX'S CASE.

Mr. *Malins* and Mr. *Fooks*, in support of the motion.—The section of the Act on which the Master acted in making the order, was the 66th (*a*). But that section does not apply, because the money is not in the hands of the appellants as “contributories,” or in any of the other characters described in the section. The finding of the Master is, in this respect, unsupported by any evidence.

Mr. *Russell*, Mr. *Daniel*, and Mr. *Bramwell*, for the official manager.—The 66th section of the Act does not require that the money should be in the hands of a contributory

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In re
**THE TRING,
 READING, AND
 BASINGSTOKE
 RAILWAY CO.**
Cox's Case.

in that character; in order to give the Master jurisdiction, it merely requires that he should be a contributory and have the money in his hands. If more had been required, the section would have been expressed in similar terms to those in the Friendly Societies Act (*a*), giving those societies priority, on the bankruptcy of their officer, over other creditors, in respect of monies in his hands belonging to the society. That Act expressly confines its operation in this respect to monies in the officer's hands, "by virtue of his said office or employment," and does not extend to any other monies of the society which he may have as banker or otherwise; and many questions have arisen on the distinction (*b*). The present Act would have contained a similar qualification, if it had been intended to introduce one. That part of the order which describes the money to be due from the appellants "as such members or contributories" is not necessary to support it, and, if considered not to be fully supported by the evidence, may be rejected as surplusage. But it may be fairly said, that this loan would never have been made to the appellants, except as contributories. Moreover, the 92nd section gives the Master power to adjudicate upon and determine any matter in contest between the Company and any individual contributories, which may be necessary or proper to be determined in order to the complete winding up of the Company. Under this clause, therefore, the Master would have jurisdiction, and under the 118th section the Court has the same powers as would have been exercisable in a suit for dissolution.

The VICE-CHANCELLOR said, that in his opinion the 92nd section did not apply. And, with regard to the 118th, his Honor asked if a case could be produced of an ordinary suit, in which, after the usual decree had been made for

(*a*) 4 & 5 Will. 4, c. 40, s. 12.

Harris, 1 De G. 162; and *Ex parte*

(*b*) See *Ex parte Whipham*, 3
 M., D. & De G. 654; *Ex parte*

Stamford Friendly Society, 15 Ves.
 280.

taking partnership accounts, the Court had made a separate order for payment by one partner of a sum due from him for goods supplied to him by the firm.

At the conclusion of the argument his HONOR said—
There are three phrases in this order, which have been contended to be surplusage, or immaterial, or to be capable of rejection, between which there is, perhaps, not much difference: one is “such members or contributories;” another, “such members and contributories as aforesaid;” the other is “as members or contributories of the said Company.” I am of opinion that I am not authorised to consider these passages as surplusage, as immaterial, or as capable of being rejected. I am clearly of opinion that the Master did not mean them to be so considered. So far, I believe, I am not differing from the learned person whose certificate is under consideration. The next question is, whether these passages are supported by the evidence. The Master must have considered them to be the necessary or proper result of the evidence before him, according to his construction of it, or he would not have inserted them. I am unable so to view the evidence, and I am obliged to state and to act upon the effect that the evidence produces on my own mind; which is, not to shew that the three passages are the true result of the facts. The consequence is, that, without entering into the very important question, whether, under this jurisdiction, the Master may not order the appellants to pay over to the Company this sum, if they owe it, I must discharge this order, and send the matter back to the Master to review his decision. My order will be, that, without prejudice to any question, the order, certificate, or report of the Master be discharged, except so far as it finds that William Cox & Henry Poore Cox were on the 28th October, 1845, and ever since continued to be and are now, contributories to the Company and members of it, and to refer it back to the Master to review his certificate or report, reserving the costs.

1850.

In re
THE TRING,
READING, AND
BASINGSTOK
RAILWAY Co.

COX'S CASE.

1850.

In re
THE TRING,
READING, AND
BASINGSTOKE
RAILWAY CO.

COX'S CASE.

It was ordered that the certificate, report, or order of the Master charged with the winding up of this matter, dated the 1st day of February, 1850, be discharged, save so far as it found that William Cox & Henry Poore Cox therein named were, on the 28th day of October, 1845, and had ever since continued to be and then were, contributories or members of the said Company.

And it was ordered that it be referred back to the said Master to review his said certificate, report, or order.

And the Court did reserve the costs of this application until after the said Master shall have so reviewed his said certificate, report, or order; and any of the parties were to be at liberty to apply to this Court as they might be advised.

Feb. 18th &
March 26th.

Ex parte LATTA,

In the Matter of THE ROYAL BANK OF AUSTRALIA;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP
ACTS, 1848 & 1849.

A petitioner for the usual winding up order, described in his petition as of a place out of the jurisdiction of the Court, was ordered, on the suggestion of the respondent, to give security for costs, as a preliminary condition to hearing the petition.

Mr. James Parker and Mr. Cairns supported the petition.

Proceedings had been taken in Scotland against a member of a Joint-stock Company, in respect of liability of the partnership:—*Held*, a proper case for winding up the Company on his petition.

Ex parte Watson first p. 257. Atkins v Cooke
3 Drewry 694. The Home Assurance Co. 12 Eq. 113

Mr. *Russell* and Mr. *C. Webster*, for five of the directors, objected, that, as the petitioner was out of the jurisdiction of the Court, the petition could not be heard until he gave security for costs; and they cited *Re Passmore* (a), and *Ex parte Seidler* (b).

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Ex parte
LATTA,
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 THE ROYAL
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 AUSTRALIA.

The VICE-CHANCELLOR said, he did not remember this question to have arisen under the Act, but that the objection appeared reasonable; and his Honor considered that security to the extent of 100*l* ought to be given.

The petitioner having given security for costs, the petition came on to be heard this day. *March 26th.*

It appeared that an action had, in the month of October, 1849, been brought in the Court of Session in Scotland, a court of record there, against the petitioner and other shareholders, to recover 5000*l* from them in respect of a debt due from the Company; that such action was still pending; and that similar actions were pending against the petitioner in the courts in Scotland, to the amount in the whole of 107,569*l* 4*s*.

The petitioner gave the Company notice of these proceedings, and required the demands to be paid, or security to be given, to indemnify him against them to his satisfaction, within ten days.

The Company did not pay, secure, or compound for the debts, or procure the actions to be stayed.

Mr. *James Parker* and Mr. *Cairns* asked that the Company might be wound up, under these circumstances.

Mr. *Russell* and Mr. *C. Webster*, for the five directors, made no objection to the order.

Mr. *Bacon* and Mr. *Anderson*, for some of the shareholders.—The 5th paragraph of sect. 5 of the Winding-up Act,

(a) 1 Beav. 94.

(b) 12 Sim. 106.

1850.

Ex parte
LATTA,
In re
 THE ROYAL
 BANK OF
 AUSTRALIA.

1848, provides, that the order may be made if any action shall have been brought in any of her Majesty's courts of record against any contributory of a Company for any debt or demand which shall be due or claimed to be due from or by such Company, and such Company shall not, within ten days after notice in writing by such contributory of such action shall have been served upon the Company, in manner hereinbefore directed, with respect to any judgment debt, have paid, secured, or compounded for such debt or demand, or have otherwise procured such action to be stayed, or shall not have indemnified the defendant to his satisfaction against such action, and all costs, damages, and expenses, to be incurred by him by reason of the same.

A proceeding in a court in Scotland is not within this provision, and the petitioner has not shewn any other cause for winding up the Company. To wind it up will, in fact, be most injurious.

The VICE-CHANCELLOR:—

This case may or may not be within the 5th paragraph of the 5th section of the Act: upon that I give no opinion; but in the 8th paragraph is this provision,—“Or if any other matter or thing shall be shewn, which, in the opinion of the Court, shall render it just and equitable that the Company should be dissolved;”—and upon the construction of that paragraph, adopted by the Lord Chancellor in *Spackman's case* (a), that it must be considered as referring to cases ejusdem generis with those previously specified, I am of opinion that this case falls within the section, and that the petitioner is entitled to the order he asks.

The usual order for dissolving and winding up the Company was made.

(a) 1 De G. & S. 604.

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In the Matter of **THE WORCESTER, TENBURY, AND LUDLOW RAILWAY COMPANY**; *March 16/4.*

AND

In the Matter of **THE JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.**

THIS was the petition of the Directors of the above Railway Company seeking payment out of Court of 466l.

The Company, which had been provisionally registered, was, by an order dated the 7th day of May, 1849, and made upon the petition of William Cooper, ordered to be absolutely dissolved as from the 7th day of May, 1849, and wound up under the provisions of the Joint Stock Companies Winding-up Acts, 1848 and 1849.

An official manager had been appointed, and had issued the usual notices fixing the 21st day of December, 1849, as the day for settling the list of contributories.

Upon that day several persons to whom the circulars had been sent attended, and objected to their names being placed upon such list, and the Master declined to place the names of any of them upon the list of contributories.

Nothing further had been done before the Master, nor was there any name upon the list.

The whole number of shares allotted was 7325; of these the petitioners were now in possession of 6480, as the beneficial holders.

The petitioners had not been able to obtain any information as to what had become of the 845 shares which still remained outstanding and unaccounted for. In the course of the years 1847 and 1848 they repeatedly advertised, both in the London and provincial newspapers, for the allottees of shares in the Company to come forward and receive pay-

An order had been made to wind up a Company, but no person had been placed on the list of contributories, and no creditor had made any claim. On the application of directors (who were the holders of 6490 out of 7325 shares), the consent of the official manager and original petitioner, and evidence that the remaining shares could not be heard of, and that the petitioners had paid, in respect of liabilities of the Company, more than the amount of the assets in the hands of the official manager, the Court ordered that amount to be paid to the petitioners on their undertaking to account for it, and stayed all

proceedings under the winding-up order.

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ment from the petitioners of divers sums of money on account of their shares; but no application whatever was made on behalf of the owners of such 845 outstanding shares, or any of them.

In support of the petition, one of the solicitors who had acted for the Company previous to its dissolution, deposed, that from his knowledge of the affairs of the Company he believed that the 845 outstanding shares, or the greater part thereof, were mislaid, lost, or destroyed; that, under and in accordance with the direction of the Master, the usual advertisements had been published in pursuance of the provisions of the above Acts, for all persons claiming to be creditors of the Company to come and prove their debts before the Master; but that no such parties had come in, nor had any claim or demand been made upon or against the Company since the date of the order absolute; and that the petitioners had, in fact, paid and discharged all the debts and liabilities of the said Company, as the deponent verily believed from his knowledge of the affairs thereof; that the 466*l.* formed part of the assets of the Company in the hands of the petitioners, who paid it to the official manager, upon his appointment. It had been paid into Court, and was standing in the name of the Accountant-General, to an account intitled "The Account of the Official Manager of the Worcester, Tenbury, and Ludlow Railway Company." The deponent also stated, that the petitioners had, out of their own monies, paid very considerable sums, far exceeding in the aggregate 466*l.*, in or towards payment and discharge of the debts and liabilities of the Company; and he believed that the further prosecution of the order absolute would be attended with very considerable trouble and expense, without being productive of any benefit or advantage to the contributories of the Company.

Mr. Russell and Mr. Baggallay supported the petition.

Mr. *Wigram* for the original petitioner, and

Mr. *Glasse* for the official assignee, consented.

The VICE-CHANCELLOR directed all proceedings under the winding-up order to be stayed, and the fund in Court to be paid to the petitioners on their undertaking to account for it as the Court should direct, and to pay the costs already incurred under the original petition, and the proceedings consequent upon it.

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THE WORCESTER, TENSBURY,
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In the Matter of THE ST. GEORGE'S STEAM PACKET COMPANY; March 23rd,
April 15th.

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.

HENESSEY'S EXECUTORS' CASE.

THIS was a motion made on behalf of the official managers of the above Company, that the names of the respondents might be placed upon the list of contributories.

By the deed of settlement of the Company it was provided as follows:—

Article 17. "That it shall be lawful for the proprietors in the said Company, or their legal representatives, whether by marriage, or as executors or administrators, or legatees, to sell and transfer to any person or persons whomsoever, all or any of the shares of such proprietor in the property and funds of the Company; and whenever any such sale and transfer shall be made, a return or account thereof shall be made to the clerk or the agent for the time being of the said Company, and shall from time to time be entered

The deed of settlement of a Joint Stock Company provided, that, until a deed of transfer of any share should be executed by the vendor and the purchaser, and should be delivered to the clerk of the Company, and a memorial of it should have been made, the purchaser should have no part in the profits. A father purchased shares

for his son without the privity of the latter, and the vendor was permitted by the Company to execute a transfer to the son in the books of the Company. The son's name was thereupon registered as a shareholder, but he never executed the instrument of transfer, received any dividend, or assented to the transaction, but always repudiated it. On the Company being wound up eight years afterwards:—*Held*, that the estate of the vendor was liable in respect of the shares.

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and registered in the books of the said Company, on payment of the fee of 2s. 6d. on each share so transferred; and the person or persons to whom such transfer shall be made, shall be and stand in all respects, and to all intents and purposes, in the place and stead of the person or persons making such transfer, and shall be liable to be sued in an action of covenant or otherwise for any breach of the rules and regulations of the said Company, as fully and effectually to all intents and purposes as if such person or persons to whom such transfer or transfers shall have been made had been a proprietor or proprietors at the date of these presents.

Article 18. "And every deed or transfer, being executed by the seller or sellers and the purchaser or purchasers of such share or shares, shall be delivered to and kept by the clerk of the said Company, who shall enter in a proper book or books to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which no more than 1s. is to be paid, and, on request, a certificate of each share shall be delivered by him to the purchaser or purchasers for his, her, or their security, and for which certificate no more than 1s. 6d. shall be paid; and until such memorial shall have been made and entered as above directed, such purchaser or purchasers shall have no part or share in the profits of the said Company, nor any interest for such share or shares paid to him, her, or them, nor any vote or votes in respect thereof as a proprietor or proprietors of the Company.

Art. 21. "That every person, who, being a purchaser of any shares in the capital of the said Company, shall take a transfer or assignment of such shares, and shall not, previously to such purchase, have executed or otherwise acceded to these presents, and shall not, at the time of the said shares vesting in him in such capacity by the means aforesaid, be a recognised proprietor in the Company in

respect of any other shares in the capital, shall, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered as a proprietor in the Company from the time of the shares being so purchased by or becoming so vested in him as aforesaid; but, as to all profits, rights, privileges, benefits, and advantages to arise from the said shares, no such person shall be considered a proprietor in respect of the same until he shall have executed or otherwise acceded to these presents."

The facts of the case appear from the following judgment of the Master:—

"By the Bank Transfer Book, p. 38, it appears that on the 22nd of October, 1841, sixteen 25*l.* shares were transferred by the testator, Mr. Hennessey, to R. Needham, and those shares were registered in the registry of shares marked (2). The shares were contracted and paid for by Thomas R. Needham, the father. He paid the testator 190*l.* for them. R. Needham did not sign the acceptance of these shares in the Transfer Book, which every transferee of shares ought, under the deed of settlement, to do for the purpose of completing his title.—(See sect. 14.) R. Needham, by his affidavit, sworn 7th November, 1849, denied that he had ever purchased or contracted to purchase, or authorised any person to purchase, shares for him in the St. George's Steam Packet Company. After the argument by counsel on the 26th November last, interrogatories were exhibited to R. Needham and T. R. Needham by affidavit sworn the 13th December, 1849; and by further affidavits sworn the 21st January, 1850; they answered those interrogatories.

"The case they make is, that, in November, 1841, T. R. Needham purchased the shares in question, and paid the testator for them; that he purchased them without any communication with R. Needham, intending to do his son a benefit by the gift of them; that he informed his son by

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letter some time in November of the purchase; that the son in December following, when on a visit to him, stated in strong terms that he would have nothing to do with the shares, and assigned as a reason his belief that the Company was in pecuniary difficulties; and the evidence as to subsequent conduct or notice to the son is, that he did not act, and received no information, by notices of calls, meetings, or otherwise, of his being in the Company's books as a transferee. I apprehend that there is nothing in this case upon which the law of principal and agent can be applied; the question is gift or no gift. There must be two parties to a gift, donor and assenting donee—" *volenti non fit donum*." The donee in this case was dissentient, in strong terms refusing the gift; he did nothing whatever subsequently to adopt the gift in terms or virtually.

"The official managers now call for my decision upon the inclusion of the executor of Mr. Henessey in the list. Instead of pursuing the course pointed out for vendors and purchasers by the 18th section of the deed of settlement, the Company adopted a practice by transfer in the book of the Company, in which were printed forms, the vendor and purchaser signed this form, the one as transferring the other as accepting shares. In the present case the testator signed the transfer in the Company's books and received his purchase-money; the Company accepted R. Needham as his transferee, and from October, 1841, treated him as the shareholder by sending him letters and notices. At the end of about eight years, the Company, i. e. the official managers, claim the executors of the testator as their partners and contributories. I cannot think that they are entitled to include them in the list; as between the Company and the testator R. Needham was substantially accepted as transferee, and the partnership between the Company and the testator was put an end to, according to the intention and understanding of both parties. T. R. Needham, the father, it may be contended, is the proper person so included. On the last

argument I expressed my opinion, that I could not make the executors of Mr. Henessey, the vendor, pay the costs of R. Needham; as between the executors and the Company I give no costs, because I think both acted irregularly. The former ought to have obtained the signature in their book of R. Needham; had they required it, the present state of things would have been prevented; so I think that the vendor ought to have seen that his transfer was complete. I have read over again the affidavit of R. Needham, I cannot consider him in any other light than as a mere stranger, brought here, as regards any conduct on his part, without the least foundation; I do not think there was any obligation on him to give the Company notice that he refused the shares. I must give him costs, as between party and party, against the official managers.

J. W. F., 26th Feb., 1850."

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Mr. Bacon and Mr. J. V. Prior in support of the appeal. *March 23rd.*
By permitting Mr. Henessey to execute the transfer in the book, the Company did not relinquish their claims upon him. No such relinquishment could arise or be implied until the transferree had also executed the transfer. The contention on the other side must be, that the officers of the Company, by allowing Mr. Henessey to sign the deed in the book, extinguished sixteen shares in the Company.

Mr. Malins and Mr. Surrage for the respondents.—The Company must by their acts be taken to have adopted Mr. Needham the son. If they chose to do so, without taking care to have a binding contract between themselves and him, that was their fault. They might have refused to permit one party to execute the transfer alone. As they did not think proper to prohibit this, they cannot, after so great a lapse of time, say that this transfer was not valid.

Mr. Bacon, in reply.

Cur. adv. vult.

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The VICE-CHANCELLOR:—

In this case I consider the effect of the evidence as being to shew that Mr. Needham's son was the person of that name mentioned in the instrument purporting to be an instrument of transfer to him of the shares in question; but that he was a stranger to the transaction, did not authorise it, has never assented to it, and has effectually disclaimed and rejected it. Mr. Needham, the father, is not a party to the controversy, and he was a witness, not a party, in the Master's office. I must, therefore, for every present purpose lay him out of consideration, except as a witness, and treat the contest as being merely between the Company or the official managers on the one hand, and Mr. Henessey's personal representatives on the other. Now, in this contest, the first, if not the only important, question that arises, as it appears to me, is whether Mr. Henessey is to be considered as having made or concurred with Mr. Needham, the father, in making to the Company, through their agent or agents, a representation that Mr. Henessey and Mr. Needham, the son, had contracted together for the purchase by the latter from the former of the shares in dispute; and this question must, I think, be answered in the affirmative; I conceive that the agent of the Company must, as between the Company on the one hand and Mr. Henessey and his estate on the other, be considered as having, during all the time of which it is material to take notice, believed, and been entitled to believe, in the accuracy of that representation. I consider, therefore, that the acts equally, and the inaction, of the Company during the whole period that it can, for any present purpose, be material to consider, must, with reference to the disputed shares, be viewed as induced by what was so represented to them, and therefore as not affecting, to the Company's prejudice, the question now before the Court. If, indeed, it had been shewn that the Company, or any agent of the Company, had with knowledge or notice of the disavowal

and disclaimer by Mr. Needham, the son, acted in a manner not fairly consistent with the official manager's present contention, the case might have stood in a position importantly different, but no such thing has been shewn. So viewing the case, I am unable to consider Mr. Henessey's representatives as entitled to impute to the Company, or any agent of the Company, misconduct of any kind, either in the shape of negligence or default, or otherwise. And the representation of fact which, as I have said, I think myself bound constructively and judicially to ascribe to Mr. Henessey, having proved inaccurate and without sufficient foundation, the consequence, as the matter appears to my mind, is, that the official managers are entitled to say to Mr. Henessey's representatives, that Mr. Henessey continued at his death, for every present purpose, the proprietor and holder of the shares. This case is perhaps one of some hardship, nor is it, I think, free from difficulty: circumstances that necessarily have not diminished the hesitation with which I have concluded upon pronouncing an opinion differing from a judgment that I respect and value highly. The costs of both parties must come out of the estate, and the case must be referred back to the Master to review his report as to Mr. Henessey.

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March 25th. In the Matter of THE BOROUGH OF ST. MARYLEBONE
JOINT-STOCK BANKING COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-
UP ACTS, 1848 & 1849.

STANHOPE'S CASE.

The deed of settlement of a Joint Stock Banking Company contained a stipulation, that in all cases not provided for by that or any supplemental deed of settlement, the directors might as in such manner as to promote the interests and welfare of the Company:—*Held*, that this clause did not enable the directors to cancel the shares of a retiring director, so as to exempt him from responsibility; but that, on the Company being wound up upwards of ten years after such a cancellation, the retiring director was properly placed upon the list of contributories.

THIS was a motion by way of appeal from the decision of the Master (Mr. *Kindersley*), whereby the name of the appellant, Colonel Leicester Stanhope, had been placed upon the list of contributories of the above Company, without qualification, in respect of fifty shares.

The nature of the Company, and some of the provisions of its deed of settlement, are detailed in *Davidson's case*, ante, p. 25.

The provisions of the deed chiefly relied upon in the present case were the following:—

“90. That in all cases not provided for by this or some supplementary deed of settlement of the said Company, it shall be lawful for the said general directors to act in such manner as may appear to them best calculated to promote the interest and welfare of the said Company; and for the better guidance of the said general directors in their management and superintendence over the property, affairs, and concerns of the said Company, it shall be lawful for them to make, from time to time, whatever rules, bye-laws, or provisional regulations they may think expedient, so as the same be not inconsistent with, or repugnant to, any of the express provisions contained in these presents, or to be contained in any supplementary deed thereto, or to the fundamental principles or constitution of the said Company, as expressly established and declared thereby, and at any time or times to alter or repeal all or any of the said rules, bye-

Busk's Case post p. 276. *Cockburn's Case* 4 July 44.
180. *Mew's Case* id 336. *Dr. Walker's Case* 8 D. M. 29. 611.
Grady's Case 1 D. S. V. 490. *Thomas' Case* 13 Eq. 438

laws, or provisional regulations so to be made, and which shall not have been established or incorporated into any supplementary deed of settlement of the said Company, but so, nevertheless, that two-thirds of the general directors at least shall concur in every such repeal, alteration, or variation."

"91. That it shall be lawful for the general directors of the said Company for the time being, but with the consent of some general meeting of the proprietors, to make any new orders, rules, laws, regulations, or provisions for the better management of the said Company and the business thereof, and to amend, alter, repeal, or make void all or any of the clauses and articles contained in these presents, or to be contained in any future deed or deeds relating to or regulating the affairs of the said Company; provided that no order, rule, law, regulation, provision, matter or thing, shall be made, done, or entered into, releasing or tending to release any proprietor from his or her liability to the said Company, or affecting the interests of the proprietors in the profits thereof, or repealing or altering the provision in these presents contained for the dissolution of the said copartnership, and provided also that no resolution of any general meeting of proprietors consenting to the alteration or repeal of any clause or article contained in these presents or in any supplementary deed thereto, shall be valid or effectual, unless notice in writing of an intention by the general directors to propose such alteration or repeal shall be sent to the proprietors of the said Company (in the way hereinafter provided for in the case of notice to the proprietors), at least one calendar month previous to the meeting at which such alteration or repeal is intended to be proposed; and unless, also, a resolution, approving of every such alteration and repeal, be not only passed at such general meeting, but be confirmed at a subsequent extraordinary general meeting. Notice in writing, expressing the object and purpose of such extraordinary meeting shall be sent to the

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proprietors at least ten days previous to the day to be appointed for the holding of such extraordinary general meeting."

The appellant was one of the directors named in the deed of settlement, and executed the deed in respect of fifty shares which stood in his name.

In April, 1838, a discussion arose at the Board of Directors, in the course of which the appellant and another director protested against a system of re-discounting bills which had been adopted; and the majority of the Board disagreeing with them on this point, the appellant communicated to the directors his wish to retire from the direction and proprietorship.

At a meeting of the directors held on the 9th of May, 1838, the following entry in the Minute Book was made:—

"Terms of Colonel Stanhope's retirement from the direction:—

"Colonel Stanhope's shares to be taken at par, with dividend to day of transfer, if realised. Release and indemnity may be arranged by the solicitors of the parties, and his proportion of attendance fees to be paid up to the time of his retirement, when the same shall have been voted.

(Signed), "FRANCIS CHARLES KNOWLES, Chairman."

The following entry was made in Colonel Stanhope's account in the Stock Account Ledger:—

"Dr. 1838, May 19th, Stock for amount *cancelled* fifty shares, 550*l*."

A new director was appointed in the place of the appellant, but it did not appear that his shares were ever re-issued.

On the 11th June, 1849, the Master, after argument, excluded Colonel Stanhope's name from the list. On a rehearing, after the decision of the *Lord Chancellor* in *Morgan's*

case(a), the Master, on the 15th February, 1850, restored the appellant's name.

The Master said, that the matter stood thus:—Colonel Stanhope had executed the deed for fifty shares, and therefore he and all the other parties who executed the deed under their hand and seal bound themselves together as a partnership and co-shareholders in the concern. Then came the question whether the act done by Colonel Stanhope and his co-directors could operate as dissolving that contract, which was made under the hand and seal of Colonel Stanhope and the other parties. Of course, if there were in the deed a sufficient authority given by the Company to the directors to do that, it would be good. Therefore the question was, whether the deed gave them authority to do it, because the doctrine of acquiescence could not be held to apply, having regard to the decision in *Morgan's case*. With regard to the "cancellation" of shares specifically, there appeared to be nothing whatever in the deed. There was a clause relating to the forfeiture of shares, but that was only for non-payment of calls. This was, however, not a proceeding for non-payment of calls. Here the directors, *bonâ fide*, (as far as it appeared), disagreeing in their view of a certain course of management in re-discounting or some matter of that kind, agreed that, rather than have that disunion which would be very detrimental to the bank, Colonel Stanhope and Mr. Serrell should not only cease to be directors but to be shareholders, and should be paid out in fact. There was no clause in the deed authorising such a transaction. The clause in the deed chiefly relied on was the 90th clause, that in all cases not provided for by the deed or some supplemental deed of settlement of the said Company, it should be lawful for the general directors to act in such manner as might appear to them best calculated to promote the interests and welfare of the Company. That clause conferred a general power upon them, whenever there was a

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(a) 1 H. & T. 320; 1 Mac. & G. 225; 1 De G. & S. 774.

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case not provided for, to act in such manner as might appear to them best calculated to promote the interest and welfare of the Company. Now the present case was certainly not provided for by the deed; and if the 90th clause stood alone, it might be a question, whether it would be sufficient to justify the directors in actually dissolving the contract which had been made under hand and seal between Colonel Stanhope and the other parties in the concern. The Master thought it would be a strong conclusion to say that it could. In *Taylor v. Hughes* (a) there was a *dictum* no doubt of Sir E. Sugden which tended to support such a view. Whether in that case the party had actually executed the deed did not distinctly appear. As far as the *dictum* went, no doubt it was an authority which went to shew, in Sir E. Sugden's opinion, that the directors would have power to do it. But there was in this case what did not occur in *Taylor v. Hughes*, or, as it appeared, in any of the cases that bore on this question, viz. a clause (the 91st) which gave power to the general directors with the consent of a general meeting to do certain acts, so as to bind the Company at large, although not present at that meeting, provided that no order, rule, law, regulation, provision, matter or thing should be made, done, or entered into, releasing or tending to release any proprietor from his or her liability to the Company. Suppose a general meeting had been convened of the directors and of the proprietors at large, to which meeting it had been proposed that this act should be done of discharging Colonel Stanhope, and dissolving the partnership contract between him and the rest of the Company, could that meeting have done it in the face of this proviso? It appeared impossible even for such a meeting of the proprietors at large in conjunction with the general directors to do so. If they could not do it, it could hardly be supposed that the 90th clause of the deed could be so construed as to give the directors, without a general meeting, a larger power than was given to the di-

(a) 2 J. & L. 53.

rectors with the concurrence of a general meeting of the proprietors. It would require a most explicit and distinct enunciation of such an intention to justify any one in coming to the conclusion that such was the true construction of the deed. Rejecting, therefore, the notion of acquiescence arising from the entry in the books, and no doubt made perfectly *bonâ fide*, and not challenged, the Master felt bound to come to this conclusion (although reluctantly), that Colonel Stanhope must be placed on the list as a shareholder for his fifty shares. The Master also observed, that there was another argument, which, although not by any means conclusive, had some degree of weight. Colonel Stanhope and Mr. Serrell had strongly objected to a particular course of management. The effect of their going out of this concern was to leave the business of the Company at large under a course of management of which they entirely disapproved, and which they thought very detrimental. Now, it might be asked what right had they, being directors, instead of bringing the matter before a general meeting of proprietors (where it might be decided whether this was a proper and beneficial course of management or not, and when it might have been corrected if it was thought wrong,) to make this arrangement with their co-directors, in consequence of something of which they so much disapproved, as not to think it safe for themselves to remain proprietors. Without saying that this was a conclusive reason, it afforded rather a strong argument which might be used in conjunction with the precise language of the deed of settlement itself, as a reason why it would not be just to discharge Colonel Stanhope. There was also this to be observed: suppose this could operate as a dissolution of a contract between the parties, it could not operate retrospectively. If it was operative, it could only operate from the time when it was done, and it was difficult to see how they could discharge him from liability, at least up to that time.

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Mr. *Makins* and Mr. *Southgate* in support of the appeal.
 —The case is governed by the authority of *Taylor v. Hughes (a)*, and the only circumstance by which the Master thought the cases distinguishable was that of the deed in this case containing a proviso (in the 91st article), that no order, rule, or provision should be made at a general meeting, under the previous part of the article, releasing or tending to release any proprietor from his liability, or affecting the interests of the proprietors in the profits. It is clear, however, that this proviso is merely a qualification of the previous part of the clause which enables meetings of proprietors to make new general rules for the government of the Company, and was not intended to apply to the exercise by the directors of the functions and duties entrusted to them in particular cases by other parts of the deed. If it were construed in the latter sense, it would contradict many other parts of the instrument, for it cannot be doubted that the exercise of many of the powers expressly conferred upon the directors, would tend to release proprietors from their liability, and to affect their interests in the profits. The very act of transferring proprietors' shares, under the express provisions of the deed, would, of course, release these proprietors.

Confining, therefore, the restriction in the 91st section to its proper application, the case is completely governed by *Taylor v. Hughes (a)*, and is, indeed, a much stronger case, because there is in the deed in this case the provision of the 90th section, empowering the directors generally to act in such manner as may appear to them best calculated to promote the welfare and interests of the Company.

Mr. *Lloyd* and Mr. *Hetherington*, for the official manager, were not called upon.

(a) 2 J. & L. 25.

The VICE-CHANCELLOR:—

This seems a hard case if the transaction was (as the counsel have admitted it to have been) fairly intended. Far be it from me to say, or to suggest, that the admission was hastily made, or to say or suggest that the transaction was unfairly intended.

Still, assuming its fairness in point of intention, it is impossible for me to disturb the conclusion at which the Master has arrived, for I think it accurate. In my judgment the transaction was beyond the powers conferred on the directors by the 90th clause of the deed. It is, therefore, unnecessary to give an opinion upon the construction of the 91st clause. I should have possibly come to the same conclusion if Colonel Stanhope had not been a director; but as he was a director, I arrive at it with less difficulty.

I cannot overrule the decision of the Master; but as the Master had previously formed a different opinion from that on which he ultimately acted I do not think it a case for costs.

1850.
In re
ST. MARLYN-
BONE JOINT-
STOCK BANKING
Co.
STANHOPE'S
CASE.

In the Matter of THE DIRECT EXETER, PLYMOUTH, AND *March 25th.*
DEVONPORT RAILWAY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-
UP ACTS, 1848 & 1849.

ROBERTS' CASE.

THIS was a motion, by way of appeal from the decision of the Master, that the name of the appellant, Mr. Roberts, might be removed from the list of contributories.

A person who, being applied to to become a member of a provisional committee of a provisionally registered Railway Company, consented by a letter with a postscript, to the effect that the acceptance must be taken subject to his approval of the plans, and that he should be held free from all liability. He afterwards attended a meeting at which the managing committee was appointed:—*Held*, that the qualification contained in the postscript was an integral part of the acceptance, and that he was not liable to be placed on the list of contributories.

1850.
 In re
 THE DIRECT
 EXETER, PLY-
 MOUTH, AND
 DEVONPORT
 RAILWAY CO.

ROBERTS' CASE.

Mr. Roberts had, in September, 1845, received a letter from Mr. Floud, a solicitor, requesting him to become a member of the provisional committee of the above Company, which was provisionally registered. The appellant, in reply, sent the following letter:—

“Direct Exeter, Plymouth, and Devonport Railway.

“Dear Sir,—Being the owner of a set of mills and land in the parish of Bridford, on the banks of the Teign, near which I presume the above railway is intended to come, I beg to inform you, in reply to your note, that you may confidently reckon on my support; in proof of which you may, should you think proper, place my name on the provisional committee of the above proposed railway.

“I am, yours truly,

“E. H. ROBERTS.

“This must be taken, subject to my approval of the plans and course of the line when definitely fixed upon, and so that I shall be held free from all liabilities.”

Mr. Roberts was thereupon advertised as a provisional committee-man, and on the 4th and 7th of October he attended meetings of the provisional committee. At the latter of these meetings a managing committee was appointed, but Mr. Roberts left the meeting before any resolution was passed.

Mr. *T. H. Terrell*, in support of the motion, contended that Mr. Roberts had incurred no liability.

Mr. *Russell* and Mr. *Roxburgh*, for the official manager.—The appellant accepted the office of provisional committee-man, and by his attendance at the meeting summoned for the appointment of a managing committee, he concurred in

Tanner's Case 5 DeG. Vol. 132.

that appointment, and authorised that committee to do all necessary acts for furthering the project. Consequently he was bound to contribute, equally with the other persons who had set the scheme on foot, to the payment of the expenses incurred under the authority given. The postscript cannot make any difference, for those who were induced to become members of the Company, by seeing the appellant's name advertised, would know nothing of the postscript; and, indeed, the postscript seeks to annex to the acceptance a condition inconsistent with it. Suppose every provisional committee-man had written such a postscript, would it exclude all contribution?

1850.
In re
 THE DIRECT
 EXETER, PLY-
 MOUTH, AND
 DEVONPORT
 RAILWAY Co.
 —
 ROBERTS' CASE.

The VICE-CHANCELLOR:—

With deference to the Master, I do not, in this particular case, arrive at the conclusion at which he has arrived. Mr. Roberts may or may not be liable to creditors of the Company, to creditors of the directors, or to creditors of the committee, or to some of the committee. That I do not consider to be a question before me.

Again, it is not necessary for me to say what I should have thought of the case if the postscript to the letter of the 22nd September had not been written; but the postscript was written. That postscript I consider an integral and original part of the contract, by which and under which Mr. Roberts was associated with the persons with whom he was associated in this matter, and it is in these terms: [His Honour read it.]

I am of opinion that the true construction of those words was, that as between themselves—as between him and the persons with whom he was to be associated, there was to be no liability on his part.

It is said, however, that he may have ineffectually endeavoured to make such a stipulation, and that the contract, though intended by him to be conditional, may, in its ef-

1850.

In re

THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY Co.

ROBERTS' CASE.

fect, have been in law or equity absolute. That is not my opinion in this case. I think that the stipulation was incorporated into the contract from the beginning, and must be considered as having accompanied it throughout. There can be no doubt that cases of difficulty may arise. One which had crossed my mind was suggested by Mr. *Russell*, namely, the case of every provisional committee-man having joined under a similar reservation as to the absence of liability and an action brought against all. In such a case possibly there would be some contribution among them all in respect of that demand, although each had contracted to exclude any liability. No such case, however, is before me.

I think it right, upon the materials before the Court, not to retain the name of this gentleman on the list, carefully confining my determination to the particular circumstances of this individual case. The costs of all parties must be paid out of the estate (a).

(a) This decision was affirmed : see 2 Mac. & G. 192.

March 25th. In the Matter of THE LONDON AND DUBLIN APPROXIMATION RAILWAY COMPANY ;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.

The affidavit
of service of a
petition to
wind up a
Company under
the Winding-up
Acts must state or shew that the person on whom it has been served is a member, officer, or servant of the Company ; and it is not sufficient to state that he is a member of the provisional committee.

THIS was a petition to have the above Company, which was provisionally registered, wound up under the provisions of the Winding-up Acts. The affidavit of service of the

THIS was a petition to have the above Company, which was provisionally registered, wound up under the provisions of the Winding-up Acts. The affidavit of service of the

petition stated, that it had been served on a member of the provisional committee named in the affidavit.

Mr. *Bacon* supported the petition.

Mr. *Goodeve*, for the provisional committee-man who had been served, contended that the service had not been made upon a member, officer, or servant of the Company, or otherwise according to the terms of the Act. The respondent had made an affidavit, stating that he merely attended a meeting of the provisional committee, and proposed a director.

Mr. *Bacon*, in reply, contended that these acts were sufficient to shew that the respondent was an officer of the Company.

The VICE-CHANCELLOR said, he could make no order, unless the affidavit of service stated that the person on whom the petition was served was "a member, officer, or servant of the Company."

No order made.

1850.

In re
THE LONDON
AND DUBLIN
APPROXIMA-
TION RAILWAY
Co.

1850.

April 26th.

In the Matter of THE VALE OF NEATH BREWERY
COMPANY.

AND

In the Matter of THE JOINT STOCK COMPANIES' WIND-
ING-UP ACTS, 1848 & 1849,
KLUHT'S CASE.

The deed of settlement of a Company prescribed certain preliminaries, which were to be observed for the purpose of making the husband of a female shareholder a proprietor in the Company:—*Held*, that a husband who had not complied with these requirements, was liable in respect of losses incurred during the coverture, but not liable in respect of any incurred before the inception or after the determination of the coverture, notwithstanding expressions used by him, in corresponding with the secretary of the Company, alluding to the shares as his.

THIS was a motion, by way of appeal from the decision of the Master placing the appellant upon the list of contributories to the above Company, as a contributory in right of his deceased wife, in respect of seven shares without qualification.

In December, 1841, which was before the marriage of the appellant, five of the shares had been transferred to his wife, then Miss Mary Cadby Keene. In February, 1842, two more shares were allotted to her.

In November, 1842, the marriage took place.

The material clauses in the deed of settlement of the Company are set out in *White's case*, ante, p. 158.

During the coverture a printed statement, the effect of which is set out in *Morgan's case*, ante, Vol. 1, p. 765, was sent to Mr. Kluht, and he returned the following answer to the Secretary of the Company.

“Twickenham, May 24th, 1844.

“Sir,—I write to acknowledge the receipt of the circular containing the resolution of the proprietors of the Vale of Neath Brewery, passed on Wednesday the 10th ultimo, and to state that, whilst I cannot but approve of the plan proposed, which, under existing circumstances, appears both necessary and desirable, I regret that it is entirely out of my power to contribute my share of the loan. With a limited income, however, which the failure of expectations from the Brewery has lessened, it would be ut-

terly impossible for me to do so. With every wish that the present arrangement may prove successful,

I remain, Sir,

Your obedient servant,

“William Lowther, Esq.

B. H. KLUHT.”

1850.
In re
THE VALM
OF NEATH
BREWERY Co.
KLUHT'S CASE.

Mr. William Keene, the brother of Mrs. Kluht, who was himself a shareholder in the Company, advanced 330*l*., in pursuance of the resolutions of the 10th of April, 1844, (see *Morgan's case*, ante, Vol. 1, p. 754), in respect of his own shares, and 70*l*. in respect of Mr. Kluht's. He gave his acceptance for 400*l*., the aggregate amount of these sums.

Upon the bill becoming due it was renewed, and ultimately returned to Mr. Keene, on payment of 330*l*. only in respect of his own shares.

After the bill became due, Mr. Lowther, the Secretary, applied to Mr. Kluht respecting the portion of the amount secured by it, which was payable in respect of Mrs. Kluht's shares.

Mr. Kluht replied as follows:—

“Wall Cottage, Twickenham,

“September 16, 1844.

“Dear Sir—In reply to yours of the 11th instant, I can only say that the Company holds the acceptance of the Rev. Wm. Keene, of Bath, for our amount, and that we have not the power at present to advance the sum, or the prospect of being able to take up such a bill.

“As, therefore, we are unable to meet the proposition, we trust the directors will not deem it right to enforce a forfeiture of shares, when inability is the only cause of non-compliance.

“I have written to Mr. Keene, who has taken steps to lay the matter before Mr. Buckland.

I remain, dear Sir, yours truly,

“W. Lowther, Esq.

B. H. KLUHT.”

1850.

In re
THE VALLE
OF NEATH
BREWERY Co.
KLUHT'S CASE.

In March, 1845, Mrs. Kluht died, leaving her husband surviving.

Mr. Kluht never signed the Company's deed, or received any dividend. He once accepted a bill for 100*l*. for the accommodation of the Company; which the Company paid and returned to him. He acknowledged the return by the following letter:—

“Twickenham, November 25th, 1845.

“Dear Sir,—I beg to acknowledge the receipt of my cancelled acceptance with many thanks; perhaps, at your leisure, you will be kind enough to inform me what has been done with my shares since the new arrangement of the Brewery.

I am, dear Sir, yours truly,

“To W. Lowther, Esq.

B. H. KLUHT.”

Mr. *Bacon* and Mr. *Rogers* for the appellant.—The appellant ought not to be on the list of contributories at all. After a wife's death, her husband is not liable for debts incurred before the coverture. The law is thus laid down in Roll's Abridgement (a):—“Si une feme soit en dette al auter et prist baron et morust, le baron ne serra chargé en dette, pur ceo apres mort de la feme.” They also cited *Heard v. Stamford* (b).

Mr. *Russell* and Mr. *T. H. Terrell* for the official manager.—The authorities cited do not apply to debts contracted during the coverture. Now, it appears that during the coverture several losses arose. In respect of these, at all events, the appellant must be held liable. But his liability is not merely of this limited character, because the deed of settlement provides means (c) by which husbands of female shareholders may relieve themselves from liability. The appellant never resorted to these means, and he must, therefore, be taken to have accepted the shares. Moreover,

(a) Page 351. (b) 3 P. Wms. 409. (c) See ante, p. 159.

the expressions used by him, in his letters to the Secretary, clearly amount to an adoption of the shares, and preclude him from repudiating liability in respect of them.

Mr. *Bacon* in reply.—The only debt or obligation was that incurred by Mrs. Kluht in taking the shares previously to the marriage.

1850.
In re
THE VALE
OF NEATH
BREWERY Co.
KLUHT'S CASE.

[The VICE-CHANCELLOR.—Suppose that two women kept a shop and carried on business in partnership, and one married and the business continued: would not the husband be liable to the other partner for his wife's share of the losses during the coverture?]

Mr. *Bacon*.—The present case differs from that suggested, in the circumstance that the deed of settlement prescribes certain forms as necessary preliminaries to the husbands of female shareholders becoming themselves members of the Company.

The VICE-CHANCELLOR:—

There must be a declaration that the appellant is not chargeable in respect of losses that arose previously to the coverture or after its determination; and with this declaration the matter must be referred back to the Master. I think that for losses during the coverture the appellant is liable, although not admitted as a proprietor in conformity with the rules. I have, under these acts, sometimes given costs to a successful appellant, but I do not think this a case for giving costs.

By the order it was declared, that Mr. Kluht was not liable as a contributory in respect of any shares in the Company to which he might be or has been entitled in right of his wife, so far as related to the debts, losses, or liabilities of the Company, arising or incurred before or after the coverture

1850.

In re
THE VALE
OF NEMATH
BREWERY CO.
KLUHT'S CASE.

between Mr. Kluht and his late wife; and it was referred back to the Master, generally, to review his certificate; and the costs of the official manager were ordered to be paid out of the estate.

May 2nd. In the Matter of **THE DIRECT EXETER, PLYMOUTH, AND DEVONPORT RAILWAY COMPANY;**

AND

In the Matter of **THE JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.**

DR. WM. HALL'S CASE.

The appellant had attended a meeting of the provisional committee of a provisionally registered Railway Company, but took no part in its proceedings, and expressly desired that his name might not be inserted in the books of the Company. Afterwards, upon threats of his name being given up to the creditors of the Company, in order that he might be sued for its debts, he paid, under protest, two sums of

THE Master, in settling the list of contributories to the above Company, placed the name of Dr. William Hall upon it as a contributory.

Dr. Hall, by his affidavit, stated that as he was walking in the High-street of Exeter, in the afternoon of the 7th of October, 1845, he was met by Mr. Floud, the solicitor to the Company, who invited him to attend a meeting of the provisional committee then about to be held at Mr. Floud's office, for the purpose of concerting measures for the formation of the Company, Mr. Floud assuring him that he would incur no liability by attending the meeting; that he accordingly proceeded to the office of Mr. Floud, and was present at the meeting, in which, however, he took no part; that he was disgusted with the proceedings, and that he left the meeting before any business was transacted; and that, before he left the house in which the meeting was held, he went into the office of Mr. Floud's clerk, and told a young man there, 15*l.* and 50*l.* demanded from him to the credit of the Company, as his proportion of certain contributions required from all the members of the provisional committee:—*Held*, that the appellant was not a contributory to the Company under the Winding-up Acts.

It is not of necessity to disbelieve or to attribute error to an affidavit, because the deponent is interested, and because a witness not interested deposes in a different manner; and the Court, believing the whole of the affidavit of an interested deponent, decided the case in his favour, though the testimony of a witness not interested was different.

who apparently was acting as clerk to Mr. Floud, not to put his (Dr. Hall's) name down in the books of the Company, and that he would have nothing to do with the railway scheme. Dr. Hall further deposed, that he called on several consecutive days at Mr. Floud's office for the purpose of ascertaining from Mr. Floud, or Mr. Farrant, the secretary to the Company, personally, that his name had not been inserted in the Company's books; but that he could not obtain an interview with either of them until Sunday, the 12th October, 1845, when he saw Mr. Farrant, who promised to erase his name from the books of the Company. Dr. Hall also stated that he had been informed and believed, that his name did not appear in any prospectus or other printed papers of the Company; and that, on or about the 22nd of October, 1845, he was informed that the name of a Mr. J. N. Hall had been printed and published in an Exeter newspaper, in a prospectus of the Company, and fearing least it might be mistaken for his name, he immediately wrote to Mr. Farrant, reminding him of his promise to have his (Dr. Hall's) name struck out from the Company's books, and requesting that the proper residence of J. N. Hall might be attached to his name. Dr. Hall also distinctly denied that he had ever authorised Mr. Farrant, the secretary of the Company, or any other person, to insert his name in the list of the provisional committee.

Dr. Hall also deposed, that, on the 2nd of November, 1845, he received a letter from Mr. Farrant, stating that his name had been erased from the prospectus, agreeably to his request; and that he heard no more of the Company until the 1st of January, 1846, when he received a printed circular from Mr. Farrant, calling upon him to pay to the credit of the Company 15*l.*; and that, after having been threatened that his name should be given up to the creditors of the Company, to be sued by them for their demands against the Company, he, in order to avoid any

1850.

In re
THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.

DR. HALL'S
CASE.

1850.

In re
THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.

DR. HALL'S
CASE.

such proceedings at law being taken against him, was induced to, and did on the 14th of January, 1846, pay 15*l.* into the City Bank, Exeter, to the credit of the Company, under a protest that he was not liable.

Dr. Hall also stated, that, in the month of April, 1846, he was threatened by Mr. Floud with actions at law by certain creditors of the Company unless he paid an additional sum of 50*l.*; and that, to save himself from any further annoyance, he paid that sum, on receiving a written guarantee from Mr. Floud, on behalf of the Committee of Management of the railway, that he should be held harmless from and indemnified against all future or further expenses.

Dr. Hall also deposed, that he never applied for or took any shares in the Company, and that he never took any part in the proceedings of the Company; that he never attended any meeting before or after the 7th of October, 1845; and that he made the two payments of 15*l.* and 50*l.*, not in respect of any shares, but under the dread and fear of being sued for larger amounts by the creditors of the Company, in the then unsettled state of the law.

Mr. Farrant, the secretary of the Company, was examined *vivâ voce* before the Master. He deposed that Dr. Hall requested him to insert his name in the list of the provisional committee, in consequence of which he inserted it; and that Dr. Hall attended the meeting of the provisional committee of the 7th of October, 1845, at which the committee of management was appointed. He admitted that Dr. Hall subsequently desired to have his name withdrawn.

The Master deciding that Dr. Hall's name should be placed on the list of contributories, gave a written judgment, the following extract from which contains the Master's reasons:—

“It appears to me that Dr. Hall unwisely consented to be a member of this committee, and did that which is an important act, he mixed himself up with the disbursements

of money. I think it very difficult to say that a gentleman so acting ought not to be put down on the list of contributories."

Mr. T. H. Terrell for the motion.—Dr. Hall could not have been placed on the list as a contributory unless his own affidavit had been used in evidence; but, if any part of the facts to which he deposes is to be received, all must be admitted. Now, the whole affidavit shews that Dr. Hall never consented to be a member of this Company, but that, on the contrary, he did all he could to prevent his name appearing as a member on the books, as well as on the published prospectus of the Company.

The sums of 15*l.* and 50*l.* paid by him were paid for the sake of peace, and they cannot, under the circumstances detailed in Dr. Hall's affidavit, be treated as an acknowledgment of his liability to the shareholders or to the public. His name ought not, therefore, to be placed on the list of contributories: *Robert's case (a)*.

Mr. Russell and Mr. Roxburgh were for the official manager.

The VICE-CHANCELLOR:—

The definition of the word "contributory" is contained in the 3rd sect. of the Winding-up Act, 1848. It is thus expressed—"The word 'Contributory' shall include every member of a Company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof."

It has not been suggested that the affidavit of Dr. Hall is not to be considered, although he is directly interested. If it is the duty of the Court to look at it, then it must be the duty of the Court to estimate the degree of credit due

1850.

In re
THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.

DR. HALL'S
CASE.

(a) See ante, p. 205.

1850.
 In re
 THE DIRECT
 EXETER, PLY-
 MOUTH, AND
 DEVONPORT
 RAILWAY Co.
 —
 DR. HALL'S
 CASE.

to it—not of necessity to disbelieve it, or attribute error to it, because Dr. Hall is interested, and because a witness not interested deposes in a different manner.

So viewing the affidavit of Dr. Hall, I consider myself bound to state my belief that Dr. Hall has deposed correctly; believing that affidavit I find myself unable to say that Dr. Hall was a contributory of the Company, if Company there was, or bound to contribute to its liabilities or losses. With deference to the Master, I would rather not retain Dr. Hall on the list.

Mr. *Russell* desired to add to the evidence, and that the case might go back to the Master to give the official manager the opportunity to do so.

The VICE-CHANCELLOR:—

On that request let it go back to the Master to review his decision.

The costs of both parties should be paid out of the estate.

May 6th. In the Matter of THE GREAT EASTERN AND WESTERN
 RAILWAY COMPANY;

AND

In the Matter of THE JOINT STOCK COMPANIES WIND-
 ING-UP ACTS, 1848 & 1849.

UPON a petition to wind up a Company under the Winding-up Acts, a preliminary inquiry was directed as to the expediency of making the order, although the petition was unopposed.

THIS was a petition to wind-up the affairs of the above Company. A similar order had, on the first hearing, been made to that in *Ex parte Pocock* (a).

(a) 1 De G. & S. 731.

Mr. *Logie*, for the petitioner, now said, that various attempts had been made to obtain an inspection of the accounts without success, and that, ultimately, it was stated that the books and papers of the Company were in the hands of persons who claimed a lien upon them, and declined producing them unless they were paid the amount of their claim.

1850.
In re
THE GREAT
EASTERN AND
WESTERN
RAILWAY Co.

The petition was unopposed.

The VICE-CHANCELLOR :—

One of the Masters, for whose judgment and experience I entertain the highest respect, tells me, that, in his opinion, it would be of great benefit, if, in cases of unopposed petitions under these Acts of Parliament, a preliminary reference were directed to the Master under the 12th section of the Act of 1848, as to the expediency of making the order to dissolve or wind up the Company. I am told that some of these cases would have been stopped at an early stage if such an inquiry had been directed. I think that it will be proper to make such an order in the present case.

Mr. *Logie* said that there been on the former occasion an opposition to the petition, which appeared now to be withdrawn.

The VICE CHANCELLOR said, that the reference ought to be directed as the matter stood.

1850.

May 8th.

In the Matter of THE GERMAN MINING COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.

STONE'S CASE.

The official assignee of a bankrupt shareholder of a Company paid, out of the bankrupt's estate, calls becoming due on the shares after the bankruptcy, and the creditors' assignees, in the usual course of business, signed memoranda vouching the accuracy of the official assignee's accounts, containing entries of the payments of the calls:—*Held*, that the surviving creditors' assignee had not thereby rendered himself liable to be placed on the list of contributories in his own right as member by survivorship.

THIS case is reported ante, page 120, upon an application to commit Mr. Stone for not answering satisfactorily questions put to him in the Master's Office.

A motion was now made on behalf of Mr. Stone, by way of appeal from the Master's decision, which placed him upon the list of contributories.

In December, 1837, Mr. Stone and a Mr. Sewell (since deceased) were appointed creditors' assignees of a bankrupt named Christopher Richardson, who was a holder of two shares in the above Company.

By the assignees' accounts, dated the 17th of May, 1838, and filed with the proceedings under the bankruptcy, it appeared, that Mr. Gibson, the official assignee, had paid three calls, which became payable after the bankruptcy upon the bankrupt's shares in the Company of 100*l.*, 50*l.*, and 50*l.* respectively.

In a further part of the assignees' accounts, exhibited in December, 1838, it appeared, that the official assignee had paid three further calls of a similar amount.

Each of these sheets of the account had, at the foot of it, the following memorandum:—

"We have examined this account, and believe it to be correct."

These memoranda were signed by Mr. Stone and the deceased creditors' assignee.

The solicitor to the fiat, on being examined before the Master, deposed, that he had, by the direction of the official

assignee, made further payments in respect of calls upon the shares.

In January, 1889, a Miss Richardson presented a petition to the Court of Review in Bankruptcy, claiming to be an equitable mortgagee of the shares, and seeking the usual order for sale. An order to that effect was pronounced by the Court, but it was never drawn up.

Mr. Gibson, the official assignee, had since died.

On evidence to the above effect being adduced before the Master, on settling the list of contributories to the above Company, the Master made a memorandum as follows:—

“That, in the case of Richardson’s assignees, the Master struck out the name of Benjamin Sewell, jun., who appeared by Mr. Stone’s examination to be dead, and settled the list of contributories as to Mr. George Stone, placing him on such list as member in his own right for two shares.”

A memorandum in the margin stated, that Mr. Stone was placed on the list as being liable by survivorship.

Mr. *Russell* and Mr. *Rogers* for the appellant.—Mr. Stone has no objection to be placed upon the list as assignee for Mr. Richardson, as was done in the case of *Kuper’s Assignees* (a). The only case made against Mr. Stone is, that the official assignee paid calls, and that the creditors’ assignees signed their names to a memorandum admitting the correctness of an account, in which it was stated that such payments had been made. According to the deed of settlement of the Company, shares in it cannot be assigned without the consent of the Company being obtained in manner therein specified. It is not pretended, that any such consent was obtained by Mr. Stone.

Mr. *Lloyd* and Mr. *Bigg* for the official manager.—The assignees by paying the calls adopted the shares and became

1850.
In re
THE GERMAN
MINING Co.
—
STONE’S CASE.

(a) Ante, p. 113.

1850.
 In re
 THE GERMAN
 MINING CO.
 ———
 STONE'S CASE.

tenants in common with the other partners in the concern.

The bankrupt had, at the time of his bankruptcy, paid only 150*l.* in respect of the shares. After the bankruptcy, the assignees thought proper to pay no less than 850*l.* for calls. They could not have taken this course in their characters of assignees, unless they had obtained the consent of every creditor, which they do not suggest that they had done: *Ex parte Hall* (a). It was their duty to realise the shares, unless they intended to continue in the partnership. On the 14th of January, 1839, an order was made by the Court of Review for the sale of the shares by the assignees. They never sold them; and, by omitting to do so, must be held to have adopted the shares. Independently of this, however, the advance by the official assignee, with the consent of the creditors' assignees, of capital to the amount of 850*l.*, was sufficient to constitute the assignees partners in the concern: *Crawshay v. Collins* (b), and *Kinder v. Howarth* (c). In the former of these cases, Lord Eldon held, that the circumstance of partnership property, in which the bankrupt was interested, remaining in the firm, was sufficient ground for deciding that the bankrupt's share in it ought to be considered as continuing notwithstanding and after his bankruptcy.

Mr. *Russell* in reply, was stopped by the Court.

The VICE-CHANCELLOR:—

The entry upon the Master's list as to Mr. Stone is thus: "In his own right as member by survivorship." Now Mr. Stone originally had no concern in this matter, except as one of the assignees of the bankrupt Richardson.

It has not been argued, nor could it have been success-

(a) 3 M. & A. 169.

(b) 2 Russ. 325.

(c) 2 Stark. 354.

fully contended in my opinion, that the mere fact of Mr. Stone having become one of those assignees, is sufficient to maintain this entry. The question is, whether more is shewn by the evidence before the Master. Evidence is continually viewed by different minds in a different way. The Master, for whose judgment I entertain the highest respect, has viewed the evidence in this case as sufficient to establish the conclusion at which he has arrived. I confess that not to be my opinion. If I am to decide on the materials before me, I must say, that they appear to my mind insufficient to maintain the entry.

I am bound, therefore, to declare, that the evidence does not shew Mr. Stone to be a contributory in his own right as a member by survivorship; and with this declaration it must be referred back to the Master to review his report; the costs of both parties must come out of the estate.

The question is not before me, whether Mr. Stone is liable to the creditors of the Company. He may possibly be liable to all the debts of the Company. The question before me is one of internal liability only.

1850.
In re
THE GERMAN
MINING CO.
STONE'S CASE.

1850.

May 30th. In the Matter of THE DIRECT EXETER, PLYMOUTH, AND
DEVONPORT RAILWAY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-
UP ACTS, 1848 & 1849.

WILLIAM HENRY BESLY'S CASE.

B. was placed, at his own request, upon the list of a provisional committee of a Railway Company, which was provisionally registered, on an assurance that he would not incur any responsibility, nor be bound to take shares. A managing committee was appointed at a meeting of the provisional committee, at which B. was not present. The secretary subsequently,

IN settling the list of contributories of the above Company, which had been provisionally registered, the Master, Sir William Horne, ordered the name of Mr. William Henry Besly to be retained on the list.

It appeared that, in the month of October, 1845, on the solicitation of Captain Berkley, one of the provisional committee, Mr. Besly, on an assurance that he would not incur any responsibility or be bound to take any shares in the Company, consented to become a member of the provisional committee; and by a resolution passed at the first meeting of the committee, on the 4th of October, 1845, Mr. Besly's name was added to the list of the provisional committee.

At a second meeting of the provisional committee, held on the 7th of October, 1845, at which Mr. Besly was not present, it was resolved, that a managing committee should

in pursuance of a resolution of the managing committee, offered shares to B., which, by letter, he declined to take, requesting that his name might be withdrawn from the provisional committee. The committee, by resolution, agreed to comply with this request, and B.'s name did not subsequently appear in the published prospectuses. The projected Company was not formed. Heavy liabilities were incurred by the managing committee; and at three meetings of the provisional committee subsequently held, which were attended by B., it was resolved that three contributions, amounting together to 115*l.*, should be paid by each of the provisional committee-men. In compliance with this resolution, B. made three payments, amounting to 115*l.* An order was made for winding up the Railway Company under the Winding-up Acts:—

Held, that even if B. continued to be a provisional committee-man, he was not therefore and merely as such a member of the Company ordered to be wound up; and his name was removed from the list of contributories.

Where an abortive Railway Company has been ordered to be wound up, the provisional committee for forming such Company is not identical with the Company itself. The object of the provisional committee was only to procure the formation of the Company; and although the members of the provisional committee may be liable to contribute inter se, they are not, as such, contributories to the Company directed to be wound up.

Tanner's Case 5 Del. 46, 182. *Ex parte Roberts*
1 Drewry 207.

be appointed, to consist of twelve members; and seven persons were then appointed; but the complete number was never perfected. The seven persons took upon themselves the powers given to the managing committee, and all the liabilities of the Company were incurred by the order or direction of these seven persons.

A meeting of the managing committee was held on the 3rd of November, 1845, at which an offer to allot certain shares to the provisional committee was directed to be made by the secretary.

The secretary accordingly offered the specified allotments of shares to the provisional committee, and, among them, to Mr. Besly.

On the 6th of November, 1845, Mr. Besly wrote to the secretary a letter in reply, in the following words:—

“Sir,—I find it will not be quite convenient for me to take up the shares which are allotted to me as one of the provisional committee of the Direct Exeter, Plymouth, and Devonport Railway. I must therefore request that my name be taken from the list; and I give you this early intimation, that I may be no obstacle to the shares being allotted to another person.

I am, Sir, your obedient servant,

“W. H. BESLY.”

At a meeting held on the 7th of November, 1845, the provisional committee, in pursuance of the above request, expunged the name of Mr. Besly, and directed their secretary to inform him thereof. The secretary did not make any communication on the subject to Mr. Besly, but Mr. Besly's name was subsequently withdrawn from all advertisements and published lists of the provisional committee.

The managing committee continued to conduct the busi-

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In re
THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.

BESLY'S CASE.

1850.

In re
THE DERMOT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.

BEALY'S CASE.

ness of the Company; but it having become apparent that the undertaking could not be proceeded with, the managing committee, at a meeting held on the 27th of December, 1845, passed a resolution to call a meeting of the provisional committee on the 31st of December, 1845.

In consequence of this resolution, a meeting of the provisional committee was held on the 31st of December, 1845, when a report of the managing committee on the affairs of the Company was received, approved, and adopted, and the thanks of the meeting were given to the managing committee for the manner in which they had conducted the affairs of the Company. A resolution was also passed, that the provisional committee should pay, on or before the 10th of January then next, the sum of 3*s.* per share, on one hundred shares each, (being 15*L.*), to meet the liabilities of the Company.

Mr. Bealy attended the meeting of the provisional committee of the Company held on the 31st of December, 1845, but he was not present until all the resolutions had been passed; and he attended the meeting in ignorance that his resignation as a provisional committee-man had been accepted.

In pursuance of the resolution passed at the above meeting, application was made to Mr. Bealy for the sum of 15*L.* as his contribution towards the liabilities of the Company, and he paid that sum on the 14th of January, 1846.

On the 2nd of March, 1846, a meeting of the provisional committee was held, at which it was resolved that the secretary should inform every member of the provisional committee, that, unless 65*L.*, including the former payment of 15*L.*, were paid on or before Wednesday, the 25th of March, his name would be handed over to the creditors of the Company.

The secretary accordingly wrote, on the 11th of March, 1846, the following letter to Mr. Bealy:—

"Direct Exeter, Plymouth, and Devonport Railway.

"I am instructed to forward to you, as one of the provisional committee, a copy of the resolutions unanimously adopted at a general meeting of the provisional committee on the 2nd inst., and to request that you will pay into the bank of Messrs. Sanders & Co., Exeter, the sum thereby required, or so much as with any previous payments you have made will make that amount.

"The committee expected that the allottees of shares would have paid the small sum of 3s. per share towards the expenses; but they regret to say that hitherto they have been disappointed in that respect.

"The committee hope that the payment now required will be sufficient to relieve the members of the provisional committee from further claims, and trust that each member will see that, by complying with the terms of the resolution, he will save himself from much heavier demands, and probably much personal annoyance, as the committee must give the names of the defaulters to the creditors, who will no doubt immediately bring actions against them for their claims on the Company."

Mr. Besly paid the sum of 50*l.*, on the 25th of March, 1846, to the Company, in compliance with the request made to him in this letter.

The provisional committee, at a meeting held on the 31st of August, 1846, resolved, that the members should pay 50*l.*, making with their previous payments 115*l.*; and the solicitor was requested to cause the creditors of the Company to enforce payment from such provisional committee-men as had not paid their contributions.

The solicitor to the Company applied to Mr. Besly, in pursuance of this resolution, for the contribution of 50*l.* from him. Mr. Besly wrote a letter in reply, dated the 10th of September, 1846, in which he says: "As a man of honour

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THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY Co.

BESLY'S CASE.

1850.

In re
THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.
—
BESLY'S CASE.

and an honest man, I have always paid my just debts, and it is my intention to discharge the agreement I subscribed my name with others to. It is not convenient for me immediately to do so, as I have before stated, but I shall be in Exeter to-morrow (Friday), and will call on you."

Mr. Besly accordingly called on the solicitor, and paid the 50*l.* demanded of him.

Mr. Besly deposed that he made the above three payments to avoid the personal annoyance of being sued for the debts of the Company, as was threatened, and also as a matter of expediency, rather than incur the costs and risk of defending all the actions, which the creditors might be induced to bring against him.

Mr. Besly never pledged his credit in respect of the Company, nor authorised any person to do so on his behalf; and it appeared, that all the liabilities of the Company had been incurred by the managing committee.

The Master decided that Mr. Besly was a contributory.

The present motion was by way of appeal from that decision.

Mr. *Karslake* for Mr. Besly.—Mr. Besly, under the circumstances, was not liable to the creditors of the Company: *Bell v. Lord Mexborough* (a). If it be said that this is a question, not of the liability of Mr. Besly to the creditors of the Company, but merely of his liability to the other members of the Company, as between him and them, then the whole of the circumstances clearly shew, that Mr. Besly never was a member of the provisional committee; but, even assuming him to be a member of that committee, he did no act to render him liable as a contributory, and the mere fact of his being on the provisional committee does not render him liable as a contributory: *Ex parte Cottle* (b).

(a) 5 Railw. Cas. 149. (b) Since reported, 2 MacN. & G. 185.

Mr. Bealy states, that he made the several payments to avoid the vexation of numerous suits. It has been already held, that contributions thus made are not sufficient to constitute those persons contributories who were not so otherwise: *Dr. Hall's case (a)*, and *Roberts' case (b)*.

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In re
THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.
—
BEALY'S CASE.

Mr. *Russell* and Mr. *Roxburgh* for the official manager.—
The present case differs from others in this, that Mr. Bealy agreed to become a member of the provisional committee, and was admitted as such; and notwithstanding Mr. Bealy's express wish to cease to be a member, and the suggested concurrence of the committee therein, it is clear, that Mr. Bealy attended the meeting of the committee held on the 31st of December, 1845; and the only view consistent with that attendance is, that he was then understood to have continued a member of the committee. He also attended the subsequent meetings of the 2nd of March and 31st of August, 1846; and in pursuance of the resolutions of these three meetings he paid three sums of 15*l.*, 50*l.*, and 50*l.*, acts quite inconsistent with the notion now insisted on, that he did not consider himself as continuing to be a member of the provisional committee, and only to be explained in the sense in which Mr. Bealy, by his letter of the 10th of September, 1846, explains them, where he treats the claim as one which, as a man of honour and an honest man, he was bound to pay, and where he expresses his intention to discharge the agreement to which he had signed his name, with others. [They cited *Morgan's case (c)*, and *Hollinsworth's case (d)*.]

The VICE CHANCELLOR:—

The Company ordered to be wound up is the Direct

(a) Ante, p. 214.

1 MacN. & G. 225.

(b) Ante, p. 205.

(d)) Ante, p. 102.

(c) 1 De G. & S. 750, and

1850.

*In re*THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.

BESLY'S CASE.

Exeter, Plymouth, and Devonport Railway Company. In that Company Mr. Besly never held or accepted a share, and never agreed to hold a share; and it appears to me that he is not a member of that Company. But it is contended, on behalf of the official manager, that if not a "member" he yet is a "contributory," and, as a contributory, ought to be included in the list. Is Mr. Besly then a person liable to contribute to the payment of any of the debts, liabilities, or losses of the Company? He was a member of the provisional committee certainly. But the object of the provisional committee was to procure the formation of the Company; they were not themselves the Company as I understand the matter; and I think, that, as a member of the provisional committee, this gentleman did not become liable to contribute to the debts, liabilities, or losses of the Company. I do not see any ground for the supposition. He may be liable, and I assume, for the purposes of the argument, that he is liable to the debts, liabilities, or losses of the provisional committee. For instance, the provisional committee, as an association of gentlemen, may have hired a room, and for what they so hired they may be liable to pay, but not as the Company. If the provisional committee had been directed to be wound up, it may be that Mr. Besly would have been one of the contributories of it. But it was not the provisional committee that was directed to be wound up. The Direct Exeter, Plymouth and Devonport Railway Company, which, in my judgment, is not the provisional committee, was so. I must respectfully express my dissent from the opinion of the Master. It appears to me, that it is not established that Mr. Besly is or was a contributory to the Company directed to be wound up. I do not decide that there is no Company. I decide that a contributory to a provisional committee, and a contributory to a Company are different. The order to be made should declare that it has not been proved that Mr. Besly is a

contributory to the Company; and it not being alleged on behalf of the official manager, that any further evidence can be adduced, the name of Mr. Bealy should be directed to be removed from the list of contributories.

1850.
In re
THE DIBNOT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.
BESLY'S CASE.

Upon an appeal to the *Lord Chancellor*, his Lordship thought, that, under the circumstances, the name of Mr. Besly ought to be inserted in the list of contributories (a).

Lord *Cottenham* having resigned the Great Seal, the motion was by leave reheard before Lord *Truro*, who, on the 29th of May, 1851, affirmed the decision of the Vice-Chancellor.

(a) 2 Macn. & G. 176.

Ex parte **INDERWICK,**

June 1st.

In the Matter of **THE GREAT MUNSTER RAILWAY CO.;**

AND

In the Matter of **THE JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.**

THIS was a petition presented by an original allottee and holder of shares in the above Company, which had been provisionally registered. It sought the usual order for winding-up the Company.

The Company was formed in February, 1845, and the provisional committee received deposit monies to an amount

Where, upon a petition for an order under the Winding-up Act, it did not appear that there existed any debt or liability of the Company, or that the

petitioner had sustained or was likely to sustain any loss in respect of any debt of the Company, and no assets were shewn to exist except such as might arise by compelling the directors to make good monies expended by them in purchasing shares to enhance the price of them in the market:—*Held*, not a proper case for an order. And the transactions complained of having occurred five years before the presentation of the petition, and having been the subject of an investigation and a suit instituted four years previously, and compromise, and also of another petition which had been abandoned on a compromise, the new petition was dismissed with costs.

Ex parte Widd 12 Drewry 468.
Re Sanderson's Patent Ass. 12 79. 188
In re Newnes Patent Co 48. D. 875

1850.

Ex parte
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THE GREAT
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exceeding 29,000*l.*, from allottees of shares, who signed the usual parliamentary contract and subscribers' agreement. The directors, with a view to raise the price of their shares in the market, applied portions of the deposit money, to an amount exceeding 4000*l.*, in the purchase of scrip shares, the greater part of which amount was lost. They, not having sufficient monies, also borrowed a sum of 10,000*l.* at interest, in order to enable them to make up a sum sufficient to pay into the Court of Chancery, in compliance with the standing orders of the Houses of Parliament, as a preliminary to the Bill being brought in.

The Bill was withdrawn in May, 1846, in pursuance of a resolution of a general meeting of the Company.

Great dissatisfaction was felt with the proceedings of the directors, and a committee was appointed at a general meeting of shareholders, held in May, 1843, at which the petitioner was present, to examine the accounts of the Company. The committee not being satisfied, a bill in Chancery was filed, in June, 1846, seeking to charge the directors personally with the loss arising from the purchase of scrip shares, and for a general account and a final arrangement of the affairs of the Company, but the suit was terminated by a compromise. It did not appear, however, that the petitioner had any knowledge of the compromise.

In May, 1849, a petition was presented by Mr. Capper, a shareholder, for an order to wind-up the affairs of the Company, and the present petitioner made an affidavit in support of that proceeding; but the petition was abandoned upon a compromise.

The Company had ceased to carry on business; but it had not been dissolved, nor had its affairs been wound up.

It was sworn that there were assets of the Company then in the hands of the directors to a large amount, but this was denied by the affidavits on the part of the directors. It was also alleged, that a large balance was due from the directors, in respect of which they had not accounted.

Mr. Russell and Mr. Hetherington for the petitioner.

Mr. Bacon and Mr. Anderson for the directors and certain shareholders in the Company objected to any order being made.

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Ex parte
 LINDERWICK,
In re
 THE GREAT
 MUNSTER
 RAILWAY CO.

The VICE-CHANCELLOR:—

This is a petition presented in a case where it is not suggested that the Company has any debt or any liability, but in which it is suggested that there is no debt, no liability. It is a case in which there is no suggestion that the petitioner has sustained, or is likely to sustain, any loss or damage, or has been or is likely to be exposed to any action, suit, or demand in respect of any such debt.

It is said, however, that there may be property of the Company to be divided under this petition. But in truth there is no property capable of being brought into a state for division, subject to this single remark, that it is alleged, and perhaps truly, that the directors laid out the money of the Company in purchasing shares to raise the price of them in the market. That may have been an irregular transaction, but there is nothing to shew that it was done with either a dishonest or fraudulent intent.

If there were no more in the case, I should very much doubt whether the machinery of the Winding-up Act would be applicable for the purpose of enabling this kind of wrong to be remedied, seeing that the ancient modes provided for redress in such cases are still available.

But these transactions occurred a considerable time ago, and this petition was not presented until March in the present year. The petitioner was present at a meeting of shareholders who directed an investigation of the affairs of the Company, including this very transaction; the result of which was a suit.

That suit was followed in 1849 by a petition, in support

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of which the present petitioner was a witness. That proceeding also produced a compromise and costs.

Last of all this petition is presented in March, 1850. Let it be dismissed with costs.

June 6th,
 19th, & 26th,
 & Nov. 8th.

In the Matter of THE DIRECT EXETER, PLYMOUTH, AND
 DEVONPORT RAILWAY COMPANY;

AND

In the Matter of THE JOINT STOCK COMPANIES WINDING-
 UP ACTS, 1848 & 1849.

MATHEW'S CASE.

An application for shares in a provisionally registered projected Company was made on Oct. 20th, 1845. No answer was returned till Dec. 15th, when a letter of allotment was sent to the applicant, who took no notice of it. The circumstances of the projected Company had considerably changed in the interval. On an appeal from the decision of the Master, placing the applicant on the list of contributories, an issue was directed, to try whether the allotment was made *bonâ fide*; and a verdict having been found in the negative, the applicant's name was removed from the list.

Semble, that the circumstance of some persons being advertised as provisional directors without their consent, is not sufficient ground (no fraudulent intent being proved) for removing from the list of contributories an allottee who was induced by the advertisement to apply for shares.

THIS was a motion by way of appeal from the decision of the Master placing the appellant on the list of contributories to the above Company (*a*). The appellant had, on the 20th October, 1845, sent a letter of application for shares in the following form:—

“To the Provisional Committee of Management of the Direct Exeter, Plymouth, and Devonport Railway.

“I request you will allot me 100 shares of 25*l.* each in the above Railway; and I undertake to accept the same, or such number as you may appropriate to me, subject to the regulations of the Company, also to sign the necessary legal documents, and to pay when required a deposit of 2*l.* 12*s.* 6*d.* per share.”

No answer was at that time returned to his application. In the beginning of November, 1845, a panic took place in the share market, and shares in projected railway com-

panies were selling at a discount. The applicant's name was removed from the list.

(*a*) For the circumstances relating to this Company, see *Roberts' case*, ante, p. 205; *Dr. Hall's case*, ante, p. 214; and *Besly's case*, ante, p. 224.

Ex parte Roberts & Drewry 207.

panies became greatly depreciated. At this time several shares remained unallotted, although there had been more than sufficient applications to absorb the whole of them.

On the 15th of December a letter of allotment was sent to Mr. Mathew, to the following effect:—

“Number of Letter 425.—Number of Shares 100.

“Deposit, 262*l.* 10*s.*

“5, Bedford Circus, Exeter, Dec. 15th, 1845.

“Sir—I am instructed to acquaint you that the committee have allotted you 100 shares in the above undertaking, on which a deposit of 2*l.* 12*s.* 6*d.* per share must be paid to one of the under-mentioned bankers on or before Tuesday, the 23rd day of December instant. The plans, sections, &c., have been duly deposited, and all the necessary notices published. Scrip certificates will be delivered in exchange for this letter and the receipt at the foot signed by one of the bankers; and notice will be given, by advertisement or circular, of the times and places appointed for the execution of the Parliamentary deeds, when scrip will be delivered.”

To this letter, Mr. Mathew returned no answer.

In support of the appeal, the minute books and the statements in a case laid before Mr. *Chitty* for his opinion, on behalf of the Company, were relied upon.

Mr. *Roundell Palmer* and Mr. *W. M. James* for the appellant.—Neither in the prospectus nor in the printed form of application is there any stipulation as to the payment of preliminary expenses in the event of the project failing. The appellant was induced to consent to the application to become a committee-man by seeing the names in the prospectus. It afterwards appeared that several of these names were inserted in the prospectus without any authority. The appellant never consented to take any shares. He did, on

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In re

THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.

MATHEW'S
CASE.

1850.

In re

THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.MATHEW'S
CASE.

the 20th of October, request that shares might be allotted to him. But it cannot be inferred from this request that he consented to take them on the 15th of December, when the letter of allotment was sent. It is clear, from the change which had then taken place in the prospects of the Company, that the allotment was merely made to render Mr. Mathew liable to loss, and would never have been made had the concern prospered. At that time the persons who allotted the shares knew that the project was abortive, and that the committee were unable to meet their engagements. [The *Vice-Chancellor*.—I think Mr. Mathew would have acted more prudently if he had answered the letter of allotment, and had refused the shares.] Such a course might have been more prudent, but we submit that it was not necessary, for the letter of allotment was an attempt to bind Mr. Mathew to a contract into which he had never consented to enter. The directors were bound to have apprised him of the altered state of affairs, and to have inquired if he still desired to have the allotment. It has been held, that the same circumstances which would entitle a subscriber to a return of his deposit, will exclude him from liability to contribute. They referred to *Pitchford v. Davis* (a), *Nockels v. Crosby* (b), *Wontner v. Shairp* (c), *Woolmer v. Toby* (d), and *Fox v. Clifton* (e).

Mr. *Russell* and Mr. *Roxburgh*, for the official manager, contended that there was nothing to shew that the allotment was not made *bonâ fide*; and that, if the appellant had wished to repudiate it, he should have done so at once.

The VICE-CHANCELLOR reserved his judgment.

(a) 5 M. & W. 2.

(b) 3 B. & C. 814.

(c) 4 Railw. Cas. 542.

(d) 4 Railw. Cas. 713.

(e) 6 Bing. 776.

The VICE-CHANCELLOR:—

This appeared and still appears to me a case of some difficulty; not so much on account of some of the names in the list of provisional directors having been inserted without authority, as otherwise. Were it safe, in my opinion, to ascribe to a fraudulent intention the insertion of those unauthorised names in the prospectus, I might perhaps have thought the fact more important than I do; but the evidence does not seem to me to justify that conclusion. The possible reliance of individuals on particular men mentioned in it, is certainly not to be forgotten; but any of the persons whose names were thus used with their consent, might, I suppose, rightfully have retired, and withdrawn from all connection and all interference with the undertaking before or after Mr. Mathew's application for shares; and there was a power to add to the number of provisional directors, those actually mentioned in the prospectus being, I think, four-score. I must recollect, too, some recent decisions, which in a manner oblige me, I think, to say, that if Mr. Mathew's application of the 20th October, 1845, for one hundred shares, was answered and accepted fairly, honestly, and in due time and manner, his name must, as far as I am concerned, stand where the Master has placed it.

My great embarrassment has been in coming to a conclusion upon the question, whether the application was answered and accepted fairly, honestly, and in due time and manner. The case, in this respect, upon the materials before me, being, in my judgment, one of a suspicious character.

Was there an honest reason for the delay in answering the application until the middle of December? Was the cause uncertainty as to the goodness or badness, the hopefulness or hopelessness, the promising or unpromising nature of the speculation? And if there were applicants not well friended nor much considered, were they intended to be recipients of loss if there should be loss, but not by any

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In re
THE DIRECT
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MOUTH, AND
DEVONPORT
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MATHEW'S
CASE.
June 19th.

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In re
THE DIRECT
EXETER, PLY-
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DEVONPORT
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MATHEW'S
CASE.

means participators in any probability of gain? Was there material dissimulation in the letter of allotment of the 15th of December? Was the undertaking, when on the 15th that letter was despatched to Mathew, in a hopeless or a sinking and failing condition? And if it had been at the time in a prosperous or hopeful condition, would that or any such communication have been sent to him? Was the letter truly and really an invitation or admittance to a share not in an adventure but in a misadventure?—to a participation, not in an enterprise, but, under that pretence, in defeat and ruin believed to be inevitable? Was, in short, the letter an act, or the result, of criminal conspiracy or sheer fraud, for the purpose of dishonestly throwing on Mr. Mathew, and others similarly circumstanced, the whole or part of a burthen properly sustainable in another quarter exclusively?

These are views of the matter which it is far from agreeable to suppose possible, and I regret not to find myself able to treat the suggestions (that have in effect been made) of their existence as devoid of plausibility.

The case, I repeat, in this respect, after a careful consideration of dates, the minute books, the statement laid before Mr. *Chitty*, and the rest of the evidence, appears to me one of suspicion. I do not, however, find enough for conviction.

I think that, judicially, I should not be at present warranted in designating the letter of allotment as the result of conspiracy, or as an act of fraud. A case of that kind ought, I apprehend, upon the materials before the Court, to be taken judicially as not proved.

But, the letter being supposed not to be fraudulent, was it an answer or accession to the application of October in reasonable time? This also, I think, a difficult question. Assuming, however, as I have said, the absence of fraud, I am not satisfied that the letter was not in such time as at least to render it incumbent on Mr. Mathew, if he had on his part abandoned his intention of October, and wished to

have no longer any connection with the scheme, to inform one or both of the two committees, or the secretary, to that effect. Mr. Mathew might, perhaps, have been entitled to do so. He left the letter of the 15th of December unanswered and unnoticed, as he did that of the 31st.

I ought not to dissent from the Master's finding upon no more than a doubt, whether, in his place, I should have done as he has done, or upon a conjecture that the person against whom he has decided might have made a better case. The order that I pronounce is, to refuse the motion, without costs, and without prejudice to any application that may be made to the Master to rehear the matter, or review his decision upon additional evidence. I may say, that if the two Acts of Parliament now before me are as advantageous to society in general as they seem to be to the profession of the law in particular, they must certainly be great achievements in legislation.

Mr. *Roundell Palmer* suggested that the question of fact might be tried by an action or an issue at once, instead of being again tried before the Master. He referred to the 91st section of the Act of 1848, and asked leave to consider and speak again to the case on this point.

The VICE-CHANCELLOR said, he did not think that an action would safely try the question; but that he would give counsel leave to speak on Monday to the question whether there should be an action or an issue.

Mr. *Roundell Palmer* and Mr. *W. M. James*, for the appellant, submitted that issues should be directed to try whether the letter of allotment was sent *bonâ fide* to the appellant, and whether it was sent within a reasonable time after the application for shares.

Mr. *Roxburgh*, for the official manager, contended, that

1850.
In re
THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.
—
MATHEW'S
CASE.

June 28th.

1850.

In re
THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY Co.

MATHEW'S
CASE.

the proper course would be for the matter to go back to the Master, whose finding the Court had not disturbed, and who might, under the powers conferred upon him by the Winding-up Acts, direct issues, if the appellant, by the production of further evidence, or otherwise, should shew that such a course was proper.

The VICE-CHANCELLOR said, he thought the Court ought to direct issues; and gave the counsel liberty to speak to the matter as to the form of the issues, and the place where they should be tried.

June 30th.

Mr. Roundell Palmer and Mr. W. M. James submitted that there ought to be two issues: first, whether the allotments were made *bonâ fide* with a view to the prosecution of the undertaking; and, secondly, whether they were made in reasonable time; and that the official manager should be plaintiff.

Mr. Russell, Mr. Butt, and Mr. Roxburgh, objected that the issues proposed would not try the substantial question of fraud.

The VICE CHANCELLOR directed two issues, at the request of Mr. Mathew, Mr. Mathew being plaintiff: the first affirming that the allotment of shares made to the plaintiff on the 15th of December, was made to him fraudulently, or not with a view to the prosecution of the undertaking; the second affirming that the allotment was not made in reasonable time after the application of the plaintiff for the shares.

Nov. 7th.

The case now came on to be disposed of, the jury having found that the shares were not allotted within a reasonable time after the application; and that the committee did not, at the time of the allotment, intend to carry on the undertaking, and that the allotment was not made with a view to its prosecution.

Mr. *Roundell Palmer* and Mr. *W. M. James*, for the appellant.

1850.

In re
THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.

—
MATHER'S
CASE.

Mr. *Roxburgh*, for the official manager, objected that the first part of the issue, as to the allotment being fraudulent, had not been found by the jury, but had been withdrawn from their consideration by the Lord Chief Baron, who had tried the issue.

The VICE-CHANCELLOR ordered, that the appellant's name should be removed from the list; and that his costs, properly incurred in the matter in the Master's office, previously to, and also of and relating to, the applications to the Court, and of and relating to the issues and the trial, should be paid out of the estate.

HOLE'S CASE.

June 7th.

THIS was an appeal from the decision of the Master, placing the appellant, Mr. Hole, upon the list of contributors. On the 10th of October, 1845, the appellant consented to his name being placed upon the list of provisional committee-men. He afterwards requested that his name might be withdrawn, but his request was not complied with. Subsequently he paid 15*l.* to avoid further liability.

Held, that the circumstance of a provisional committee-man never having attended a meeting of the committee was not sufficient to distinguish his case from *Besly's*, to which it was in other respects similar.

Mr. *Karslake*, for the motion, admitted that the only distinction between this case and that of Mr. *Besly* was, that the appellant had never attended any meeting of the committee. This circumstance, however, he contended, took away from the case one of the facts on which the judgment of the Lord Chancellor, in *Besly's case* (*a*), mainly proceeded.

(a) 2 M'N. & G. 176.

1850.

In re

THE DIRECT
EXETER, PLY-
MOUTH, AND
DEVONPORT
RAILWAY CO.

HOLLE'S CASE.

Mr. *Russell* and Mr. *Roxburgh*, for the official manager, were not called upon.

The VICE-CHANCELLOR:—

I am of opinion that this gentleman is not a member of the Company which has been directed to be wound-up by the order of the Court, believing, as I do, that *Besly's case* was not materially different from the present.

If, therefore, I were to act on my opinion, I should (subject to what might have been said on the part of the official manager) have acceded to the motion. It is better, however, that I should act on the opinion of the *Lord Chancellor*; and viewing the case as I have said, I shall decide according to that opinion, and refuse the motion without costs.

*May 25th &
June 25th.* In the Matter of THE LARNE, BELFAST, AND BALLYMENNA
RAILWAY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-
UP ACTS, 1848 & 1849.

Ex parte BAKER.

Where a wind-up order had been obtained by a petitioner, who abandoned it, upon a compromise with the directors, before carrying it into the Master's office, the

Court gave the prosecution of the order to a second petitioner; and on the death of such second petitioner before he had taken any further step in the matter, the Court, upon an *ex parte* motion, gave the carriage of the order to another shareholder.

ON the 18th of January, 1850, the Court made the usual order to wind up the affairs of the above Company, on the petition of Stafford Henry Northcott, a shareholder in the said Company.

The directors appealed against this decision, but the appeal never came on, the directors compromising with Mr.

Northcott by paying him a sum exceeding 7s. 6d. per share, and 100*l.* for costs, out of the assets of the Company; the order was never carried in before the Master. The directors afterwards bought up several other shares, at the rate of 7s. 6d. per share.

Under these circumstances, a petition was presented by Mr. Costigin, a shareholder, praying for the usual winding-up order, or, in the alternative, that the Court would order that he should have the carriage and prosecution of the order obtained on the application of Mr. Northcott.

Mr. Russell and *Mr. C. Hall* for the petitioner.

The VICE-CHANCELLOR made an order that the petitioner should have the carriage and prosecution of the order, and reserved the costs.

The order was drawn up and passed.

Mr. Costigin died, and was buried on the 5th of June, 1850.

Mr. *C. Hall* now moved, on behalf of Thomas Baker, that the carriage and prosecution of the original order might be given to Mr. Baker. He read two affidavits, the first verifying the death of Mr. Costigin, and the second deposing to Mr. Baker being a shareholder in the Company.

No notice of the motion had been given either by advertisement or by service on any shareholder.

The VICE-CHANCELLOR granted the application, but said it would be at the risk of Mr. Baker whether the order should be discharged, if, upon application, the Court should see sufficient ground for taking that course.

1850.

In re
THE LARNE,
BELFAST, AND
BALLYMENA
RAILWAY CO.

Ex parte
BAKER.
May 25th.

June 25th.

1850.

June 20th.

In the Matter of THE VALE OF NEATH AND SOUTH WALES BREWERY COMPANY;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.

WALTERS' SECOND CASE.

Shares in a Joint-stock Company were transferred by the directors to W., a purchaser, irregularly, by entries in the Company's book, and not by allotment or deed, as required by the Company's deed of settlement. In respect of this transfer as a qualification, W. became a director. At the expiration of half a year, and in October, 1841, he became desirous to retire from being either director or shareholder; and at a meeting of the directors with W. it was agreed that

THE above case was heard on the 31st of January, 1850, upon a motion then made by the official manager, by way of appeal from the decision of the Master, who had excluded his name from the list of contributories to the Company. The Court referred it back to the Master to review his report.

A report of that hearing will be found ante, pp. 149—157.

Mr. Walters appealed from this decision. The appeal was heard by the *Lord Chancellor* on the 8th of March, 1850, and was dismissed with costs.

Upon the review of the case before the Master, the several circumstances stated in the former report remained unchanged.

Mr. Walters was examined on his own behalf before the Master; but, though he did not recollect some of the circumstances as then stated, he did not expressly deny any of them; and Mr. Buckland, who was also examined for Mr. Walters, admitted that he was virtually the principal manager of the Company, and that Mr. Walters left it to him to arrange as to transferring all the shares into Mr. Walters' name.

the shares should be taken back; and he was repaid the value of the shares by a promissory note, signed, as for the Company, by one director in favour of another, and indorsed to W. The note was ultimately paid, but no transfer was regularly made or executed; W. thenceforth ceased to act as director and to be treated as a shareholder:—*Held*, that the directors had no power to accept the shares back from W., and that W. could not be presumed to be ignorant that they were without that power, and that his name was properly on the list of contributories. *Quære*, whether the Winding-up Acts, 1848 & 1849, do not go beyond devising modes of enforcing liabilities previously existing, and have not created new liabilities?

It also appeared that both sets of shares which were transferred into Mr. Walters' name were acquired by him from the directors.

As is stated in the report, ante, p. 153, Mr. Walters retired from the Company on the 11th of October, 1841. On that occasion, Mr. Buckland, Mr. Slancombe, and Mr. Little, three of the directors, met Mr. Walters, by appointment, at the house of Mr. Little, in Bath, in consequence of Mr. Walters' letter of the 6th of October, 1841. Mr. Buckland at that time also proposed that the shares should be taken back from Mr. Walters, and that the Company's note for 1000*l.* should be given to him for them. Mr. Walters objected to this proposal, alleging that he could not well use such a note with the Banking Company in which he was a partner. After some discussion, the following promissory note was prepared and signed:—

“Neath, October 11th, 1841.

“Twelve months after date we promise to pay Joseph Slancombe, Esq., or order, the sum of One Thousand Pounds, value received.

“For the Vale of Neath and South Wales Brewery Co.

“£1000.

“W. H. BUCKLAND.

Mr. Slancombe indorsed the note, and handed it over to Mr. Walters.

The shares were afterwards transferred, in the Share Register Book, from Mr. Walters' account to that of the directors; but it did not appear that Mr. Walters knew to whom they were transferred.

No transfer of the shares was ever executed by Mr. Walters. The bill was not paid at maturity, but it was ultimately paid in full to Mr. Walters.

The Master decided that Mr. Walters was a contributory.

This was a motion by Mr. Walters, by way of appeal from the decision of the Master.

1850.

In re
THE VALE OF
NEATH AND
SOUTH WALES
BREWERY CO.

WALTERS'
SECOND CASE.

1850.
In re
 THE VALM OF
 NEATH AND
 SOUTH WALES
 BREWERY CO.
 —
 WALTERS'
 SECOND CASE.

Mr. Bacon and Mr. Southgate in support of the motion. —The Master has placed Mr. Walters' name on the list; and after the decision of the Court, on the former hearing, we cannot now contend that he never became a shareholder; but we contend that, having become a shareholder, he ceased to be one in October, 1841. Mr. Walters understood that the shares were to be taken back by the party who had sold them, whether that party were Mr. Buckland or the Company; and so far as Mr. Walters was concerned or knew, that party was Mr. Buckland, he paying Mr. Walters for the shares by a security given by the Company and Mr. Slancombe. It is not to be presumed against Mr. Walters that he knew he was not selling to Mr. Buckland: *Holhewy's case* (a).

If it be said that the mode of transfer prescribed by the Company's deed of settlement was not pursued, and that, on the authority of *Morgan's case* (b), Mr. Walters continued to be liable as a contributory, notwithstanding that he parted with his shares in October, 1841, there is this circumstance which distinguishes Mr. Walters' position from that of Mr. Morgan, that the transactions between Mr. Walters and the Company were, from first to last, through Mr. Buckland; and if Mr. Buckland had the power to bind Mr. Walters as a contributory, by an irregular transfer of shares to him not completed with the formalities required by the deed of settlement, he had power, in the same way, to loose him from that obligation. Moreover, Mr. Walters appears to have believed that he was fully discharged in October, 1841, from his character of shareholder. The directors, who fully represented the Company in the transaction, concurred in inducing Mr. Walters to think he was then discharged; and the Company ought, at this distance of time, to be bound by their acts.

(a) 1 De G. & S. 777.

(b) 1 De G. & S. 750, and 1 M'N. & G. 225.

It was, from October, 1841, notorious to every member of the Company that Mr. Walters had ceased to be a director; and the books by which the shareholders ought to be bound, and are actually bound under s. 48 of the Winding-up Act, 1848, shewed that he had also ceased from that time to be a shareholder; and, after the lapse of years, the universal acquiescence by all members of the Company ought to be taken as conclusively binding.

Mr. Russell and Mr. T. H. Terrell, for the official manager, were not called on.

The VICE-CHANCELLOR:—

This is probably a hard case for Mr. Walters; and perhaps he is placed in a situation of liability in which he never would have been but for the two Acts of Parliament in question, which, construed as they have been, may be thought, perhaps, to go beyond devising modes of enforcing liabilities previously existing—and to create new liabilities. This seems so important a view of these Acts of Parliament, that I purposely express myself in terms of doubt upon it.

I was, however, and am of opinion, that the acquisition of the shares in question by Mr. Walters was an effectual acquisition by him from the directors, as representing the Company, and not from Mr. Buckland, as a private man. I am also of opinion that Mr. Walters must be taken to have had notice before the month of October, 1841, that such was the nature of the title. That being so, what was the transaction of October? I hope that I am not wrong in saying that I should have been very glad to bring this within the principle of *Hollwey's case*(a); but I cannot, consistently with what I consider the due administration of justice, do so. I am of opinion, that the true nature and

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In re
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WALTERS'
SECOND CASE.

(a) 1 De G. & S. 777.

1850.

In reTHE VALE OF
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SOUTH WALES
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WALTERS'
SECOND CASE.

the true intention of the transaction of October, 1841, on the part of Mr. Walters, and of every one else concerned, was to give back the shares to the quarter from whence Mr. Walters had derived them, which quarter was, I must take it, believed by Mr. Walters to be, and was in fact, the Company, or the directors as representing the Company, and not Mr. Buckland. But consistently with *Morgan's case*(a), I cannot say that such a transaction was valid. I cannot say that the directors, on behalf of the Company, had power to accept these shares; I cannot judicially say that Mr. Walters was ignorant that they were without that power. The consequence is, that without contradicting *Morgan's case*, which I ought not to do, I cannot hold this gentleman exempt. I fear that I must leave Mr. Walters where he is.

The motion was refused, with costs.

(a) 1 De G. & S. 750; 1 M'N. & G. 225.

GORDON'S CASE.

THE Master had placed the name of Mr. George Gordon upon the list of contributories to the above Company.

This was a motion by way of appeal, by Mr. Gordon, from the Master's decision.

The question as to Mr. Gordon's liability arose under the following circumstances:—

The Company was formed under a deed of settlement, by the first clause of which the capital and objects of the Company were specified (a). By the 37th clause it was provided, that the proprietors of shares should be authorised to assign their shares to any person, subject, nevertheless, to the approbation of the directors for the time being; but no assignment without the approbation of the directors, to be manifested as thereafter mentioned, was to have any force either in law or in equity.

The 41st clause provided as follows:—"The approbation of the directors in all the above cases, to be valid, shall be manifested by entries or memorandums to that effect in the share register-book, under the signatures of two of the directors for the time being, and by like memorandums, so signed, added to or indorsed upon the copies

deed of settlement to render transfers of shares valid were not complied with. The purchaser, by letter, in 1843, requested that the dividend on his shares should be paid to a specified individual; and a dividend, which was the only dividend then payable, was paid accordingly. Notices of meetings and of other proceedings usually sent to shareholders were regularly sent to the purchaser; and in reply to one of such notices in 1845, the purchaser wrote to the secretary concurring in a proposal then made to sell the Company's place of business, and therewith to pay its liabilities. That letter was recorded in the minutes of the meeting, at which a resolution to the proposed effect was come to:—*Held*, that there was a complete agreement on the part of the purchaser to become a shareholder, and an acceptance of him, as such, by persons having the management of the affairs of the Company, who were competent to act as they did; and that the purchaser's name was properly placed upon the list of contributories.

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In re
THE VALS OF
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SOUTH WALES
BREWERY CO.
July.

Twenty-seven shares in a Joint-stock trading Company were assigned by two shareholders to a purchaser in 1842. Notice thereof was given to the secretary in 1843, and he made an entry of the transfers in pencil in the share ledger of the Company. The Company was dissolved in May, 1847, and in August following the secretary perfected in ink the entry which he had so made in pencil; but other formalities required by the Company's

The purchaser. The purchaser.

(a) See this clause stated at length in *Morgan's case*, 1 De G. & S. 750.

1850.
In re
 THE VALR OF
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 ———
 GORDON'S CASE.

or certificates of the former entries respecting the shares in question in the share register-book; or, instead of such last-mentioned memorandums, by such copies or certificates being delivered to the parties entitled thereto, of the new or altered entries respecting the same in the share register-book."

It appeared by the admissions made in the case, that, by an indenture, dated the 13th of November, 1842, (being an assignment in the common form used by the Company,) in consideration of 299*l.* 19*s.*, expressed to be paid to John White Little, he assigned fifteen shares, Nos. 2611 to 2625, both inclusive, in the Company to Mr. Gordon, subject to the provisions of the Company's deed of settlement; and Mr. Gordon covenanted with the trustees of the Company to observe and perform the stipulations of the Company's deed; and by a similar deed, of the same date, Joseph Rusher, in consideration of 240*l.* expressed to be paid to him in like manner, assigned twelve other shares in the Company to Mr. Gordon, who thereby entered into a similar covenant with the trustees of the Company to observe the stipulations contained in the Company's deed of settlement.

The following entries were made, upon the receipt of the two deeds of transfer, by the secretary of the Company, at p. 175 of the shareholder's ledger:—

175 <i>Dr.</i>				George Gordon.				<i>Cr.</i>			
1842.	<i>Folio.</i>		<i>No. of Shares.</i>	<i>£ s. d.</i>	184	<i>Folio.</i>		<i>No. of Shares.</i>	<i>£ s. d.</i>		
Nov. 15	11—18	From J. W. Little .	15								
"		From J. Rusher .	12								

The words "George Gordon," and the figures 15 and 12, were written in pencil by the secretary, and so con-

tinued until the month of August, 1847, when he wrote the same in ink; and he then, for the first time, wrote the words and figures, "November 15, 11—18," "From J. W. Little," and "From J. Rusher." Corresponding entries were made at the same time in the same ledger in pencil and ink, in the accounts of Mr. Little and Mr. Rusher.

No other entries were made in the Company's books as to the transfer of the shares, and no approval by the directors of the transfers otherwise appeared.

Mr. Gordon, by letter, addressed in April, 1843, to the secretary, requested that the dividends on the shares transferred to him should be paid to Mr. Dunn. A dividend then due was accordingly paid to Mr. Dunn; but the secretary regularly sent all notices of meetings and of other matters to Mr. Gordon, as a shareholder.

In the month of July, 1845, a meeting of shareholders was convened by the secretary, by letter, in pursuance of a requisition to consider the propriety of selling the premises, and to take measures to discharge the remaining liabilities of the Company. Mr. Gordon having received the letter, and a copy of the requisition, wrote to the secretary that he considered it advisable as proposed to sell the premises, and to apply the proceeds to the payment of the remaining liabilities. This letter was recorded in the minutes of the meeting.

The business ceased to be carried on on the 31st of December, 1844; and the Company was dissolved by a resolution of a general meeting, held on the 5th of May, 1847.

Mr. Bacon and Mr. Toller for the motion.—Mr. Gordon's name ought not to be on the list of contributories. In *White's case*(a), which was in the same Company, the Court thought that there must be an effectual approval and an effectual admission of the purchaser as a

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 IS AT
 THE VALE OF
 NEATH AND
 SOUTH WALES
 BREWERY CO.
 GORDON'S CASE.

(a) Ante, p. 167.

1850.

*In re*THE VALM OF
NEATH AND
SOUTH WALES
BREWERY CO.

GORDON'S CASE.

proprietor by the directors. In the present case there is neither such approval nor admission of Mr. Gordon.

Mr. *Russell* and Mr. *Twells*, for the official manager, were not called upon.

The VICE-CHANCELLOR:—

The formalities required by the deed, in this instance, were not complied with. Several cases in various Companies have come before me, in which I have held that compliance not necessary, and the absence of compliance not material. There have been also other cases, in which the want of compliance with them has been held to be material. That depends upon the circumstances of each particular case. Here I am of opinion, upon the evidence, that there was a complete agreement on the part of Mr. Gordon to become a shareholder, and an acceptance of him as a shareholder by those who had the management of the affairs of the Company, and who were, for this purpose, competent to act as they did act. I do not see any ground for dissenting from what the Master has done.

Motion refused, with costs.

1850.

In the Matter of THE UNION BANK OF CALCUTTA;

June 22nd &
July 17th.

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-
UP ACTS, 1848 & 1849.

Ex parte WATSON.

THIS was a petition by Mr. Watson, a shareholder in the above Company, resident in England, praying for the usual order for winding up its affairs.

The Company was organised and established in India as a Joint-stock Company, in the year 1829, by persons all of whom were then resident in India, for carrying on the business of banking at Calcutta. Its constitution was regulated by two deeds of partnership, dated the 1st of August, 1829, and the 1st of August, 1839. By the latter of these deeds it was provided that the business of the Company should consist in issuing notes and bills of exchange at the office in Calcutta, and in discounting bills and promissory notes, and in all other branches of business usual with bankers in Calcutta; and it was provided that the capital stock of the Company should be 10,000,000 of Company's rupees.

By an Act of the Legislature of Calcutta, passed in 1845, the Union Bank was authorised to sue and be sued in the name of its secretary; and it was declared that, upon any judgment against the secretary, execution might be issued against any shareholder, upon motion made for that purpose in open Court; but it was provided that that Act should not extend to incorporate the Union Bank.

The Court will not interfere under the Winding-up Acts, where there are judicial grounds for holding it not expedient to do so. A Joint-stock Banking Company, established in India, having correspondents and liabilities in this country, suspended payment in India, and proceedings had been taken there by arrangement between certain shareholders in the Company and some of the creditors, in pursuance of which others of the shareholders were sued, who refused to contribute to the

payment of the debts according to an assessment unequally made. A shareholder who was thus sued petitioned to have the affairs of the Company wound up under the Winding-up Acts; but the Court, presuming on the whole against the expediency of its interfering, declined to make the order, leaving those concerned to their ordinary remedies.

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THE UNION
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WATSON.

The partnership deeds of the Union Bank were executed at Calcutta by the shareholders in the bank; and such deeds, as well as all the books and accounts of the bank, and all transfers of shares in the bank, were always kept in the office of the bank at Calcutta, and in the custody of the officers of the bank there.

The meetings of the shareholders were always held at Calcutta, and the affairs of the bank were entirely managed in India. The directors, trustees, secretary, treasurer, and all the other officers of the bank were all resident at Calcutta.

The Union Bank carried on the business of bankers in Calcutta to a large amount. In the course of business it received at the establishment at Calcutta sums of money to the credit of persons in London, and paid the amounts accordingly in London, through Messrs. Glyn & Co., bankers in Lombard-street; and similar payments were made to Messrs. Glyn & Co. in London, on account of the Union Bank, to be paid to persons at Calcutta, which were accordingly paid; and the Union Bank drew and issued bills of exchange and promissory notes, and granted letters of credit at Calcutta, upon Messrs. Glyn & Co., which were duly honoured by the latter firm in London, as the agents for the Union Bank; and Messrs. Glyn & Co., as agents for the Union Bank, issued similar notes on the Union Bank, and which were duly honoured at Calcutta. The Union Bank received the usual banking profits on all these transactions.

It was alleged by the petitioner, that the banking-house of Messrs. Glyn & Co., in Lombard-street, was constituted a place of business for the Union Bank, and that, in this manner, it carried on the business of bankers in England.

The Union Bank suspended payment in the year 1847, being greatly indebted in India, but having also large assets and liabilities in England.

Upon a suspension of payment by the Union Bank, an

executive committee was formed at Calcutta for liquidating its debts; and a committee of creditors was also formed, by whom a scheme of contribution by shareholders was made up, and by which the shareholders were assessed in sums varying from 25*l.* per share to 200*l.* per share.

Under this assessment, Mr. Watson, the petitioner, was assessed for 200*l.* per share on fifteen shares. He refused to pay so large a contribution, and an action at law was commenced against him by Messrs. Glyn & Co. for the recovery of 5,000*l.* due to them from the Union Bank. Shareholders in the bank, at the time of its suspension of payment, to the number of sixty and upwards, were resident in England.

The petition prayed, under these circumstances, that the affairs of the Company might be wound up under the Joint-stock Companies Winding-up Acts, 1848 & 1849.

There being no office of the Union Bank of Calcutta in England, except the banking-house of Messrs. Glyn & Co., personal service of a copy of the petition was made on one of the partners of that firm at the banking-house. A member and contributory of the Union Bank of Calcutta, resident in London, was also served with a copy of the petition and with the order of the Court, whereby the hearing of the petition was specially fixed.

The petition was also advertised in six newspapers at Calcutta, including the Calcutta Gazette, several times in the month of May, 1850.

The petition was now called on. Mr. Russell, Mr. Malins, and Mr. Smale, appeared in support of it. June 22nd.

Mr. Lloyd, Mr. W. M. James, and Mr. J. S. Roupell, who appeared for several contributories to the Company, objected that the service of the petition had not been made in compliance with the directions of the Act, 1848, sect. 10.

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In re
THE UNION
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Ex parte
WATSON.

They also objected, that there had been no advertisement in any newspaper in the county, city, or borough where the fixed or only office of the Company was, according to the provision of the Winding-up Act, 1849, sect. 2.

The VICE-CHANCELLOR said, that the service on a contributory in England, and the advertisement in the London Gazette, were sufficient.

On the application of Mr. *Lloyd* the petition was ordered to stand over.

July 16th.

Mr. *Russell*, Mr. *Malins*, and Mr. *Smale* now asked for the usual order for winding up the affairs of this Company.

It is within the jurisdiction of the Court to make the order asked.

The transactions of the Company between its members would be properly the subject of suit in this Court; and as to jurisdiction, it is the same whether this Court interferes by suit or by the more summary process given by these Acts. A banker in India, drawing bills on English bankers, is liable to the bankrupt laws of this country: *Ingliss v. Grant*(a). This Company, in the same manner, would be liable to the bankrupt laws here; and it is submitted it is equally liable to the jurisdiction of this Court under the Winding-up Acts. The petitioner would have been willing to contribute his fair proportion towards payment of the debts of the Company, but he resists the attempt to force him to contribute eight times more in proportion than other shareholders equally well able to pay. This fact is uncontradicted, and of itself affords a sufficient ground for the interference of the Court under these Acts, since the ordinary remedies would be quite inadequate for the protection of the petitioner.

(a) 5 T. R. 530.

The Court has already wound up a Company carrying on the business of banking in a colony: *Ex parte Latta re The Royal Bank of Australia* (a).

1850.
In re
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Mr. Lloyd, Mr. W. M. James, and Mr. J. S. Roupell for several shareholders, in opposition to the motion, were not called on.

The VICE-CHANCELLOR:—

I assume (without however deciding) that according to the true construction of these Acts, this Court has power to direct the winding up of the Company, so far as this can be done in the absence from the jurisdiction of a large number of its members. It is not, however, in every case within the provisions of the Acts that the Court will interfere under them. It is incumbent on the Court not to act under these statutes, where there are judicial grounds for holding it not to be expedient to do so.

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This Company was established in India, and is an Indian Company, but has correspondents here, and very possibly in other parts of Europe, without which, probably, its business of banking could not be transacted. That, however, does not render it necessary to act under the statutory jurisdiction, if it is not shewn that there exist in this country the means of doing substantial justice, or more good than harm, by so interfering. In my opinion, the presumption is against the expediency of interfering in this case, and it is incumbent on the petitioners to shew that the true view is not the *primâ facie* view. But every thing that I have heard strengthens my persuasion that much more mischief would arise from acting on this petition than from declining now to interfere, and leaving those concerned to the reme-

(a) Ante, p. 186.

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dies, which, by the law of this country or of India, or of both, are open to them, independently of the two statutes.

The petition was dismissed without costs, and without prejudice to any other proceeding.

July 17th. In the Matter of THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY ;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.

GOUTHWAITE'S CASE.

The executrix of a deceased shareholder in a Joint-stock Banking Company received dividends on shares vested in him from his death in 1842 till 1846, when the affairs of the Company became embarrassed; but she was not required by the directors to execute the deed of settlement according to the provisions of that document, nor did she execute it:

—*Held*, First, that, as she participated in the profits, it was unreasonable to attribute to her and the directors an intention that she was not to be liable to contribute to the losses in some manner.

Secondly, That the receipt of the dividends was sufficient evidence that she had contracted with the directors to be a contributory.

Thirdly, That the directors were competent to make such contract; *sed quare* whether she should be a contributory personally or as executrix.

GEORGE GOUTHWAITE, being the holder of eighty shares in the above Banking Company, died in 1842, and his will was proved by his widow, Mrs. Jane Gouthwaite, the executrix named in the will.

Mrs. Gouthwaite received the dividends on the eighty shares as they became due, from the date of her husband's death up to the year 1846, when the bank stopped payment, signing the dividend receipts as executrix.

The Company was a Joint-stock Banking Company, formed under the statute 7 Geo. 4, c. 46.

The clauses of the deed of settlement mainly applicable to this case were Nos. 28, 29, 30 and 31, which are set out in *Armstrong's case* (a).

The following clause of the deed was also referred to:—

“ No. 74. In all cases not provided for by the deed of

(a) 1 De G. & S. 566.

Howard v Wheatley 3 L. M. & G. 645.

settlement, the directors may act in such manner as may appear to them best calculated to promote the interest of the Company, and welfare of the Company; and for the better guidance of the directors in their management and superintendence over the property and concerns of the Company, they may make from time to time whatsoever bye-laws and regulations they shall think expedient, so as the same be not inconsistent with, or repugnant to, any of the provisions in the deed of settlement, and may from time to time alter or repeal all or any of the bye-laws or regulations so to be made, and which shall not have been established by or incorporated into the deed of settlement, so nevertheless as seven directors at least shall concur in every such alteration or repeal."

It had not been the practice of the directors of the bank to act on clause No. 31, which authorised the Company to require the personal representative of deceased shareholders to execute the deed of settlement within six months after notice, and to declare the shares vested in personal representatives neglecting to comply with such requests to be forfeited.

In settling the list of contributories the Master included the name of Mrs. Gouthwaite therein; but on a subsequent hearing he struck out her name from the list.

This was a motion, made on the part of the official manager, by way of appeal from the Master's decision.

Mr. *Bethell*, Mr. *Bacon*, and Mr. *J. V. Prior*, in support of the motion.

The Master's decision mainly proceeded on the consideration of the 7 Geo. 4, c. 46, s. 13(a), whereby it was provided that execution upon any judgment should not be issued against any member of the co-partnership after the ex-

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(a) See this section at length, 1 De G. & S. 572.

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piration of three years next after he should have ceased to be such member. The Master thought, that, as the testator had died more than three years prior to the date of the winding-up order, his liabilities ceased; and that Mrs. Gouthwaite had done no act to bind either her testator's estate or herself personally as a holder of the shares. But Mrs. Gouthwaite having received the dividends on shares, as to which it was competent for her to perfect her title, must be held to have incurred the liability of contributing to the debts as a shareholder. The circumstance that the 31st clause had never been enforced, must be taken as evidence of its having been abandoned by universal consent.

The deed of settlement, by the clause No. 74, gives the fullest general powers to the directors to act in the affairs of the bank.

Mr. *Russell* and Mr. *T. Stevens*.—The question turns on the particular provisions of Nos. 28, 29, 30, and 31, of the deed of settlement. Under these clauses the express contract is, that an executor shall not be a partner. The payment of dividends to Mrs. Gouthwaite was in contravention of the stipulation of the deed, which could not be varied except by the express consent of all the parties to it, *Morgan's case*(a); no such consent had been obtained.

The case stands on the general law, that an executor cannot, acting in breach of trust, create a debt upon his testator's estate: *Ex parte Richardson in the matter of Hodson*(b).

In the course of the argument *Reaveley's case*(c), *Armstrong's case*(d), and *Hawthorn's case*(e), were referred to.

(a) 1 Macn. & G. 225.

(b) 1 Buck, 209.

(c) 1 De G. & S. 550; in the marginal note of which *dele* "more than three years prior to the winding up of such Company, under 11

& 12 Vict. c. 45." Also in p. 573, line 11 from the bottom, *dele* "for three years."

(d) *Ib.* 565.

(e) *Ib.* 571.

The VICE-CHANCELLOR:—

The question here is, whether the facts afford sufficient evidence of a contract between this lady and the directors, that she, either personally or in her representative character, should become answerable to the Company in respect of these shares. She, as the representative of her husband, received profits upon them, and it would be unreasonable to attribute to her or the directors an intention that she should participate in profits without being liable to contribute towards losses in some manner.

It has been contended for Mrs. Gouthwaite that the directors were not authorised to enter into the alleged contract with her; but I think that it was competent for them to do so. Without laying too much stress on clause No. 74 of the deed, which vests large general powers in the directors, the evidence satisfies my mind that there was a valid contract with and by Mrs. Gouthwaite, that she should be liable in respect of these shares; but whether the contract was with or by her in her own right, or as the representative of her husband, I cannot at present say.

The declaration will be, that the lady ought to be on the list of contributories, either in her own right or as her husband's personal representative. And with this declaration there must be a reference back to the Master to review his report.

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In the Matter of THE ROYAL BANK OF AUSTRALIA;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.

SUTTON'S CASE.

Where, by a deed of settlement of a Company, the responsibility of transferors of shares is, as between them and the Company, determined by the transfer, their possible liability to contribute *inter se*, in the event of demands of creditors being enforced against any of them, is not sufficient ground for placing a transferee upon the list of contributories, in a case where no transferee is active in making or supporting an application for that purpose.

THIS was an appeal from the decision of the Master excluding the respondent, Mr. Edward Burke Sutton, from the list of contributories to the above Company.

By the 108th article of the deed of settlement of the Company it was provided as follows:—

“That whenever, by any means whatsoever, any share shall become forfeited, or shall be duly and effectually transferred to a new proprietor, then, in such case, and not before, the responsibility of the former proprietor, as a proprietor in respect of such shares, shall cease and determine; and such former proprietor shall be exonerated and released from all subsequent claims, demands, and obligations, in respect of the same shares, and from all future observance and performance of the covenants, rules, regulations, and provisions affecting, or which ought to be observed or performed in respect of, such shares; and the entry of such forfeiture or transfer in the share register-book shall be, and be accepted, legal evidence of such forfeiture or transfer.”

By the 112th clause, it was provided that any purchaser of shares, or husband of any female proprietor, who should not have executed the deed of settlement or a deed of accession, should be considered a proprietor as to all the liabilities of the Company, but not as to the profits till they had executed such deed or deeds.

The respondent had, on the 18th of February, 1841, transferred all the shares which he held in the Company to a

The Times Five Years "Co. 30 Rev. 598.

Mr. Malcolm, and the deed of transfer was made and executed (as was usual) by and between the transferror, the transferee, and certain trustees appointed by the Company. By this deed the respondent, with the approbation of the trustees, assigned the shares to the transferee, to hold the same to the transferee, his executors, administrators, and assigns, subject to the same rules, regulations, and on the same conditions as the transferror held them, before the execution of the assignment; and the transferee thereby covenanted with the trustees to perform and abide by the provisions of the deed of settlement.

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Mr. Malins and Mr. Daniel, for the official manager, in support of the motion.—Although as between transferees and transferrors there may be no contribution, still the clause in the deed exempting the latter from liability, would not be binding upon creditors. If, therefore, the creditors were unable to procure payment from the transferees, they must resort to the transferrors, who were members of the Company when the debts due to the particular creditors were incurred. In such a case there would be a right of contribution among the transferrors themselves, and they are, consequently, persons liable to contribute to the payment of some of the debts, liabilities, or losses of the Company as former members of the same. They thus come precisely within the definition in the Act. The point is, indeed, already settled by the principles laid down in *Hawthorn's case* (a). Your Honour there said:—“The arguments that have been addressed to me have avoided the consideration of the position, as between themselves, of the various persons who are in Mr. Robert Hawthorn's position; as between Mr. William Hawthorn, and Mr. Robert Hawthorn, and also as between him and other persons in the same position, there must be a liability

(a) 1 De G. & S. 576; 1 Macn. & G. 53.

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to contribute; because a case may arise of a deficiency on the part of the persons liable before them, capable of leading to the necessity of proceeding against one of those. Clearly, therefore, as between them there must be contribution, or a right of contribution, or a power of enforcing contribution, and, therefore, liability."

And in the same case on appeal, Lord *Cottenham* said (a)—
 "Thus, every person who, in any event, may be liable, is to be included in the list, without determining in what order; the only requisite being that they are persons who may be called on to contribute. In the present case, there is a party who was, prior to the 2nd January, 1847, a shareholder, and, therefore, liable. Whether he may be now liable in an equal degree with the present shareholders, is not found by the Master, but only that he is a party liable. When the Master has found all who are liable, he is then to determine in what proportion they are to contribute. The 84th section shews, that the list consists of all who are liable to contribute, not of any particular class of contributories only."

They also cited *Sanderson's case* (b), and *Dodgson's case* (c).

Mr *Roundell Palmer* and Mr. *Hetherington* for the respondent were not called upon.

The VICE-CHANCELLOR:—

In my opinion, the true interpretation of the 108th clause in the deed of settlement is, to say, that where a purchaser of shares is, upon the transfer, accepted as purchaser by the directors, and the transaction is completed (as it appears to have been in this case), the seller of the shares is to be considered as discharged, as from the beginning and entirely, as between him and the purchaser, and as between him and the Company. Mr. Sutton may or may not be liable to the

(a) 1 Macn. & G. 53.

(b) Ante, p. 66.

(c) Ante, p. 85.

creditors of the Company; that is not the question before the Court. What I have before called external liability is out of the case.

But it has been properly observed, that there may be other persons in the same position as Mr. Sutton, namely, sellers of shares, the purchasers from whom have been accepted, and that it is possible that one of these may be made liable to the creditors of the Company, and that in such a case these persons, although not liable to the Company, may be liable inter se as a distinct class. It is possible that it may be so; but I am of opinion that such a circumstance ought not to be regarded here and now. I think, that the Court is not to consider what at most is a contingent liability between persons not members of the Company, of whom no one is active. The costs must come out of the estate.

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In the Matter of THE BASTENNE BITUMEN COMPANY; July 26th.

AND

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MR. WIGRAM, in support of a petition for the usual order to wind up the affairs of this Company, said, the only specialty in the case was, that the petitioner was a plaintiff in a suit against the directors for an account and arrangement of the affairs of the Company; and that he had been driven to present this petition from the impossibility of obtaining any effectual remedy in a suit so constituted.

Mr. J. V. Prior appeared for the directors, and submitted

leaving the question of the costs of the suit to be considered in the suit.

This Court will make the usual order for winding-up the affairs of a Company on the petition of a plaintiff in a suit against the directors for a similar object, without requiring the petitioner to pay the costs of the suit,

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that the petitioner should be put under terms to pay the costs of the suit, as the condition of his obtaining the order now asked.

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The VICE-CHANCELLOR :

It will be better to consider the question of the costs of the suit in the suit (a).

The usual winding-up order was made.

(a) See *Parbury v. Chadwick*, 12 Beav. 614.

July 26th. In the Matter of THE NORTH WESTERN TRUNK COMPANY ;

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849.

Where the circumstances of the case rendered it doubtful whether there ever had been such a Company as that sought to be wound up, the Court referred it to the Master to inquire whether the alleged Company ever existed; and if it had existed, whether it was proper that it should be wound up.

MR. GLASSE, on behalf of a provisional committee-man, moved for the usual order to wind up the affairs of the above-named Company, a provisionally registered railway scheme, but in which there had been no allotment of shares.

The VICE-CHANCELLOR said, he could not make an order to wind up that which never existed. He would direct a reference to the Master to inquire whether the alleged Company ever existed; and if he found that it existed, or had existed, then to inquire whether it was proper that it should be wound up.

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In the Matter of THE JOINT-STOCK COMPANIES WINDING-
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BUSK'S CASE.

THIS was a motion on behalf of Mr. Hans Busk, by way of appeal from the decision of the Master placing the appellant on the list of contributories.

The circumstances relating to the formation of the Company are stated in *Davidson's case*, ante, p. 21; see also, *Stanhope's case*, ante, p. 198.

The appellant was one of the projectors of the Company, and presided at the meetings of the directors from June, 1836, when the Company was formed, till his retirement, the validity of which was the question raised by the present appeal.

Among the evidence relied upon before the Master was a prospectus of the projected Company, representing the proposed capital of the concern as 1,000,000*l.*, in 40,000 shares, and setting forth the names of seven gentlemen, of whom the appellant was one, as directors of the Company, with power to add to their number. The prospectus concluded with certain "regulations" for the government of the Company, one of which was that the Company should be considered as formed when 10,000 shares had been subscribed for and the deposit paid thereon. Another regulation was, that the directors should have power to make by-laws; and the last regulation was, that a deed of settlement for the

B. was one of the projectors of a banking Company, and concurred in issuing a prospectus containing regulations, one of which was, that a deed of settlement should be prepared. Several meetings of the proposed directors took place, at which B. took the chair, and at which the terms of the deed of settlement were discussed; but before the deed was executed by any one, disputes arose between B. and other directors, and it was agreed that the former should retire and cease to be a member of the Company. The deed was af-

terwards executed, at various times, by other members, and contained a clause whereby the parties thereto ratified all acts, contracts, deeds, matters and things, up to the time of its execution, done, executed, and performed by the directors. After the execution of the deed, the dissolution of partnership between B. and the Company was advertised. On the Company being wound up several years afterwards:—*Held*, that the ex-chairman was not properly included in the list of contributories.

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government of the Company, whereby the responsibility of the proprietors should be limited to the amount of the shares held by them respectively, should be prepared, embodying those regulations, and containing all other such provisions as should be considered necessary for the efficient management of the Company and the security of the proprietors.

Another prospectus put in evidence, and issued with the appellant's concurrence, announced the intended place of business of the bank, and that the deed of settlement effectually limited the responsibility of shareholders by a clause, that, in the event of the guarantee fund and one-fourth of the capital being lost, the Company should be dissolved.

No deed of settlement, however, had in fact been then executed or agreed to.

The appellant agreed to take fifty shares, and he paid a deposit of 50*l.* thereon, on the 20th July, 1836, and took a receipt for the money. There never was any allotment of shares made to him, nor had any shares been made out or offered to him.

When only 2000 shares had been subscribed for, and the deposit of 1*l.* per share paid thereon, an advertisement was published, that the bank would open and commence business on the 5th of September, 1836; and the appellant's name was inserted in the advertisement as chairman of the directors.

The bank opened and commenced business accordingly on the 5th of September, 1836; and on that occasion the appellant acted as chairman, and signed various minutes of the business of the day and other proceedings; he also acted as chairman at meetings of the directors, on the 14th, 15th, and 16th of September, and signed the minutes.

At these meetings the draft of the deed of settlement of the intended Company was considered, and, as far as the 73rd clause, approved.

Previously and subsequently to the opening of the bank

the appellant protested both verbally and by letter against some of the proceedings of the directors, and particularly to the opening of the bank before 10,000 shares had been subscribed for; and differences arising among the directors, the appellant expressed his wish to retire from the Company.

On the 19th September, 1836, a resolution was passed, discharging him from being a director.

In a letter dated the 22nd of September, the appellant complained of the conduct of the parties managing the concern. On the 24th of September a Mr. Gargrave, a solicitor, employed by the appellant and another director named Parkins, attended a meeting of the directors on their behalf.

Mr. Gargrave gave upon affidavit the following account of what then took place:—He deposed, that, having been professionally concerned for Mr. Parkins, another director, in getting him released from any further concern with the projected St. Marylebone Joint-Stock Banking Company, and also in arranging for the repayment of the sum of 180*l.* paid by Mr. Parkins on account of the projected Company, he attended a meeting of the directors on the 24th day of September, 1836, and submitted to them a proposal for the retirement of Mr. Parkins and of the appellant from the projected banking concern, to which the directors assented; and that, in consequence thereof, the deponent then prepared the usual notice of dissolution of partnership for insertion in the London Gazette, and forwarded the same to Mr. Parkins for his signature, and that it was accordingly duly signed by him; and the deponent further stated, that the insertion of the notice of dissolution of the projected partnership in the Gazette, as regarded both Mr. Parkins and the appellant, was delayed from the 24th of September, 1836, until the 24th of October, 1836, in consequence of some negotiations between the appellant and the provisional directors of the bank for the repayment to the appel-

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lant, by the projected Company, of his deposit, but which negotiations had no reference to the question of the dissolution of the projected partnership, so agreed to on the 24th September, 1836, by the directors.

On the 1st of October, a new notice and circular were issued, stating particulars as to the mode in which the business of the bank was intended to be carried on, and omitting the appellants' name.

On the 25th of October, 1836, a notice of the dissolution of the co-partnership, as far as related to the appellants, was signed. It was advertised in the Gazette on the 26th of October and the 1st of November, and was as follows :—

"Notice is hereby given that the partnership now or lately subsisting between Hans Busk, of No. 1, Great Cumberland-place, Hyde-park, in the county of Middlesex, Esquire, and the shareholders or proprietors of stock in the Borough of Saint Marylebone Joint-stock Bank, situate at No. 9, Cavendish-square, in the said county of Middlesex, as bankers, has been dissolved.

"Dated this 25th day of October, 1836.

"HANS BUSK,

"DAVID HANNAY,

"MARTIN BALMANNO, } Managers and Public Officers."

In the beginning of October, but on what day did not appear, the deed of settlement (which was dated the 31st of August, 1836) was executed by some of the parties to it.

Some of the clauses of the deed are set out ante, pp. 25, 26, and 198.

The 126th clause was also relied upon in the present case, and was as follows :—"It is hereby agreed and declared, that, notwithstanding the signing or subscription of the respective parties to these presents may be on different days or different times, the liabilities of the different par-

ties shall be held to commence on the 5th of September, 1836. And the several persons, parties hereto of the first part respectively, do hereby ratify and confirm all acts, contracts, deeds, matters, and things, which, up to the time [in the singular 'time'] of the execution of these presents, shall have been done, executed, and performed by the provisional committee, and by the directors of the said Company or any of them, or by the order and direction of any of them, in relation to the concerns of the said Company."

On the 13th of January, 1837, the appellant obtained a return of the 50*l*. subscribed by him; and an entry was made in the books of the Company that the shares were cancelled. Calls were made, and dividends were paid to the shareholders in 1837, 1838, 1839, and 1841; but the appellant was never applied to for calls, nor ever received or heard anything in respect of these dividends; and he never received any communication relating to the bank till the 23rd of April, 1849, when he received notice to shew cause why his name should not be inserted in the list of contributories, under the Winding-up Acts.

The Master, on the evidence then before him, at first excluded the appellant; but, on the case being re-argued, after Lord *Cottenham's* decision in *Morgan's case* (*a*), he decided on placing the appellant on the list, giving, in substance, the following reasons for his decision:—

"When the matter was before me almost at the very beginning of these proceedings, I certainly did consider, (whether it was the case of a Joint-stock Company or the case of an ordinary partnership,) that if certain transactions took place, which appeared on the face of the books of the Company, without challenge, to be acquiesced in, and not complained of for a number of years, those transactions must

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(*a*) 1 De G. & S. 750, and 1 Macn. & G. 225.

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be considered as acquiesced in by all the partners, and binding on them; and on that ground I struck Mr. Busk's name out. The *Lord Chancellor*, as I understand the decision in *Ex parte Morgan*, in the *Vale of Neath Brewery case*, has decided that such acquiescence would not be sufficient; and of course I have nothing to do but to acquiesce in the principle of that decision. The case now comes before me upon other facts, of which I was not aware until to-day, to the best of my recollection. The questions, then, that arise, are these: first of all, whether Mr. Busk ever was a partner or shareholder in the concern? in other words, whether he ever was in a situation in which, if that relation was not put an end to, he would be what is by the Act called a 'contributory'? The second question is, whether, if he was, that relation has been put an end to? Now Mr. Busk was, at least up to the 15th or 16th of September, a holder of fifty shares in the Company; and I observe, with regard to the resolution of the 19th of September, that it does not in any way purport to discharge him from being a shareholder in the Company, but merely discharges him from being a co-director with the others. It discharges him from the office of director, but does not refer in any way to his position as a shareholder. I am not aware that there is any resolution in the books as to his shares at all. There is, indeed, an entry in the Stock Account Ledger of the number of shares and the amount of deposit paid, and that is balanced by a cancellation on a certain day in January of so much stock, and a return of the deposit. It is not material to the decision of the question, but it does not appear (as far as I can see) that, at any period prior to the 22nd of December, there is anything to shew an agreement (if such an agreement would have been valid) between Mr. Busk and the Company, that he should cease to be a shareholder for fifty shares, and have his deposit returned. Now, being of opinion that Mr. Busk was, on the 15th of September, a member and shareholder, the only remaining question is, whe-

ther he afterwards ceased to be a shareholder, and whether he ceased to be a shareholder so as to exonerate him from all possible liability; because I may observe that it does not follow from his being put on the list as a shareholder, that he is necessarily liable to all the liabilities of the Company. It may be, that his liabilities are limited. It is clear that he could only cease to be a shareholder by virtue of some arrangement binding upon all the other shareholders; and the transactions in question can only be said to be binding upon all and each of the shareholders, upon the footing that the 126th clause in the deed does operate as a confirmation of this, as well as all the other acts of the directors, up to some period. I think, upon the construction of that clause, that it does not operate as a confirmation of the act in question. The language of the clause is undoubtedly ambiguous in some degree. The construction that Mr. *Eade* contends for is, that each party who executes the deed separately and severally confirms all the acts done up to the time of the execution of the instrument; so that if one man signs on the 1st of January, 1837, he confirms the acts done up to that day; and another man signing on the 1st of July, 1837, not only confirms all the acts done up to the 1st of January, but all the acts done up to the time when he signs the deed. According to that view, there would be some acts done by the directors which would have received the sanction of some of the parties executing the deed, and not have received the ratification of other parties executing the deed. It would be ratified by all the parties who executed the deed after that date, but not by all the persons who executed the deed prior to that date. The question is, whether that is the sound construction of this language? If the time of the execution means the time when the individual parties do sign and subscribe the instrument, they contemplated that it would take place at different times. I think, however, that they are referring to one given period, up to which all persons who execute

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the deed at any time whatever, ratify and confirm all the acts. Then the question is, what is meant by 'the time of the execution of these presents'? It is true, the time of the date of the deed is not necessarily the time of the execution; and the date of the deed is not the date at which, according to this clause, the parties' liabilities are to commence under it; for the date of the deed is the 31st of August, and, according to the 126th clause, the liabilities of the executing parties are to begin from the 5th of September. Now, it appears that the Company began its operations as a bank on that very 5th day of September; and I think the reason for fixing in the clause the day from which the liabilities were to commence as on the 5th, was with reference to the fact that it was the day on which the operations commenced as a bank. Taking the clause altogether, it appears to me that the true meaning of the expression, 'the time of the execution of these presents,' must be—not the time or the times rather—when the different parties to it might execute the deed, but the period when the liabilities of the parties are to commence—the 5th of September, 1836. If that be the true construction of the instrument, it is quite unnecessary to refer to any other argument, inasmuch as the acts in question took place after the 5th of September, 1836; and it can never be contended, that this clause ratified and confirmed acts done on the 16th, 19th, or any other day subsequent to the 5th of September, 1836. Now this proceeds on the assumption that Mr. Busk, though not a party executing the deed, is to have the benefit of the deed or to be bound by it. Of course the argument on the 126th clause, from Mr. *Eade*, proceeds on the assumption that he is entitled to the benefit of the clause. It will be extremely difficult to reconcile any other construction than that which I have considered the right one with the 90th and 91st clauses (a). And as I cannot say that each member of the

(a) See ante, pp. 198, 199, (*Stanhope's case*).

Company is bound (even of those who executed this deed,) by an acquiescence in, or rather a confirmation of, the act done by the directors, with regard to the discharge of Mr. Busk from his being a partner in the concern; and as there is no other ground on which it can be said that each individual member has ratified and confirmed, or agreed to that transfer, the consequence necessarily must be, that I must consider that the relation which, up to the time of the transaction in question, existed between Mr. Busk and the other shareholders, the relation of co-partner or member in this concern, never was so dissolved as to be binding on all the members of the Company, and that I am under the necessity of putting Mr. Busk on for fifty shares."

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Mr. *Malins* and Mr. *Eade*, in support of the appeal.—Previously to the execution of the deed, the partnership was one at will merely; and the appellant, having retired while it was in that state, was only liable in respect of contracts entered into previously to his retirement. The Company (if any) to which the appellant belonged, is not the association directed to be wound up, which consists of different partners, and is bound by different rules. That association, by one of its own rules, confirmed the previous acts of the directors, one of which was, the assent to the appellant's retirement from the Company. They cannot, after executing that document, repudiate that assent. [They cited *Peacock v. Peacock* (a), *Featherstonhaugh v. Fenwick* (b), and *Miles v. Thomas* (c).]

Mr. *Stuart* and Mr. *Hetherington*, for the official manager.—The three points relied upon by the appellant are, the publication of the advertisement, the 126th clause of the deed, and that the Company constituted by the deed is not that in which the appellant was a partner. But the appellant was the chairman and originator of the Company. He

(a) 16 Ves. 50.

(b) 17 Ves. 298.

(c) 9 Sim. 606.

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could not relieve himself from his liability by merely publishing an advertisement in a newspaper. The directors could not cancel any shares, nor could they diminish the number of shares. Although the deed was not executed, yet its terms were agreed upon previously to the period at which the appellant contends that he retired; and it is dated, by the consent of the appellant and the rest who concurred in framing it, on a day previous to his alleged retirement. It is, therefore, binding upon him; and then the 91st clause applies just as it was held to do in *Colonel Stanhope's case* (a). [The Vice-Chancellor.—Was the arrangement there for Colonel Stanhope's retirement entered into before he had executed the deed?] It may not have been, but in this case the appellant concurred in publishing the prospectus, by which the applicants for shares had notice of the deed. He, moreover, was the person principally concerned in framing the deed, and he assented to its provisions.

The VICE-CHANCELLOR:—

The question, whether Mr. Busk is liable or not liable to any unsatisfied creditor of this Company is not before me. He may or may not be so liable; I consider that point immaterial.

The question is, whether he is liable in the character of a contributory, as between himself and the Company or its members.

It is material to observe in the present case, that the deed establishing or regulating the affairs of the Company, bearing date the 31st of August, 1836, was, as it is admitted, not executed by any person whatever before the 18th of October in that year. Until that deed had been executed by some person, the relation between Mr. Busk and the directors and the other shareholders of the Com-

(a) *Ante*, p. 198.

pany or intended Company, must be considered as regulated by the general law of the country, as it then stood. By that law, I think, Mr. Busk had a right to withdraw at any time from the partnership, so far as he alone was concerned, but not so as to exempt himself from any former liability.

Dissatisfaction having arisen between Mr. Busk and the other directors of the Company or intended Company, he first ceased to be a member of the direction, and then, by agreement between him and the directors acting in the general management of the affairs of the Association, he retired from it altogether on the 24th of September. It was then agreed in effect, on that day, that he should cease to be a member.

In pursuance of that agreement at a later date, perhaps after the deed was executed by some of the parties, advertisements were inserted in the Gazette, the earliest of which appeared on the 25th October, on which day it was sanctioned by the directors, in these terms:—

“Mr. Busk’s notice in the Gazette approved and signed by public officers.”

The advertisement was thus: [his Honor read it.]

In two or three months afterwards, in pursuance of that agreement, the 50*l.* deposit was returned. The first question is, what was the true meaning of the agreement? whether the meaning was, that as between themselves Mr. Busk was to continue liable for previous engagements, or whether he was to be considered as separated from the Company as from the beginning?

My opinion is, that the true meaning of the parties to that contract was, as between themselves, whatever it might be as to creditors, that he should be treated on the footing of having never been a member of the Company. That having taken place, as in my judgment it did, on the 24th September, although not recognised in the books until the 25th October, I find the 156th clause of the deed

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which was not executed by any person before the 18th October, worded thus:—[His Honor read it.]

I am of opinion that this ratified the agreement of the 24th September, if it wanted ratification; and that those who are parties to this deed, being in effect persons represented by the official manager, cannot be heard to say, that Mr. Busk continued a member of the Company, or that he was not discharged from his liability, according to the construction which I think it right to put upon the agreement between him and the directors.

I will add but one observation; I do not see any necessity for saying, in this particular instance at least, that the two Acts of Parliament before me have introduced *ex post facto* law to change or increase the liability of Mr. Busk. Supposing, therefore, that these Acts had not passed; supposing the agreement of the 24th September to have been made, and these advertisements of dissolution to have been published in the Gazette to the world, as they were in October, 1836, no claim having, at any time afterwards, been made on Mr. Busk; and supposing, that, instead of the order now before the Court, a bill had been filed by some on behalf of all the members, to make him contribute to any outstanding debt (if any there was), I am of opinion, considering the notice, the lapse of time, and the other circumstances of the case, that such a bill must have been dismissed. I am, on the whole, satisfied, that Mr. Busk's name ought not to be on the list.

1850.

In the Matter of THE ST. GEORGE'S STEAM PACKET
COMPANY;

July 4th.
1851.
April 1st.

AND

In the Matter of THE JOINT-STOCK COMPANIES WINDING-
UP ACTS, 1848 & 1849.

CASE OF HAMER'S Executors and Devisees.

BY the deed of settlement of the above Company the parties thereto of the first part, for themselves and himself severally and respectively, but not all or any of them jointly; and the several other persons of the second part, whose names and seals were thereunto subscribed and set, for themselves and himself severally and respectively, but not all or any of them jointly; mutually and reciprocally covenanted, declared, and agreed with and to each other:—first, that the Company thereby agreed to be formed should continue for the term of ninety-nine years from its formation, unless sooner dissolved, as thereafter mentioned.

After various other provisions the deed, by its 16th article, provided that no benefit of survivorship should take place as between the shareholders; and that all the property of the Company should, as between the shareholders and their real and personal representatives, be deemed personal estate; and that each of the shareholders, as between one another, should be entitled to and interested in the profits, and liable and subject to the losses of the Company, in proportion to his or her share or shares in the said capital fund or joint-stock, and not otherwise.

The 20th article provided, that, before the executor, administrator, or legatee of a deceased proprietor should transfer any shares vested in him in such capacity, or should

A shareholder in a Joint-stock Company bequeathed his personal estate to his wife for life, and, after her death, to his daughter absolutely, (subject to certain payments,) and he appointed his wife and daughter his executrices, and devised to them real estate.

The widow received dividends on the shares, and died; and afterwards, on the Company being wound up under the Winding-up Acts, the daughter and her husband were placed on the list of contributories, in right of the daughter as executrix of her father:—*Held,*

First, that a call was properly made upon the daughter and her husband, payable out of the testator's personal assets, whether the conduct of the executrices, in suffering their testator's assets to remain in the Company, was a breach of trust or not.

Secondly, on it appearing that the personal assets had been fully administered—*Held,* that she and her husband could not be put on the list in respect of her being devisee.

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become a proprietor in respect of such shares, or receive any dividends in respect of the same, he should leave for inspection, at the office of the Company, in Liverpool, the probate of the will or the letters of administration under which he claimed to be entitled to the shares.

The 21st clause provided, that every person who, being the husband of any female proprietor, or the executor, administrator, or legatee of any deceased proprietor, should not, at the time of any shares vesting in him in such capacity, be a recognised proprietor in the Company in respect of any other shares in the capital, should, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered a proprietor from the time of the shares becoming vested in him as aforesaid (a).

A testator, named James Hamer, who was the holder of twenty-five shares in the Company, devised all his real estates unto his wife, Elizabeth Hamer, for life, and after her decease unto his daughter Everalda Sarah, the wife of Joshua Rawdon, her heirs and assigns, forever; nevertheless, the testator conditionally wished and desired that his said daughter, her heirs and assigns, should, after the decease of his wife, pay one half of the clear annual profits thereof into the hands of his son James Hamer, during his life, monthly or half-yearly, as she or he should think proper. And as to all his residuary personal property, subject to the payment of his debts and funeral and testamentary expenses, he gave the interest, dividends, and produce thereof unto his wife for her life; and, after her decease, he gave all the residue of his personal property unto his daughter, absolutely; nevertheless, he conditionally wished her to pay one-half of the clear produce thereof into the hands of his son, monthly or half-yearly, as she should think proper, for the like purposes, and subject to the same intentions, restrictions, and conditions, and in all respects, as before-

(a) For the remainder of the portions of it applicable to that clause see ante, p. 192, where the case are set out.

mentioned respecting the moiety of the profits he had already wished to be paid into his son's hands; and so that, unless the same could be so payable and paid, the same should remain the sole property of his daughter. And he appointed his wife and daughter joint executrixes of his will.

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After the death of the testator Mrs. Rawdon received one dividend in 1839, and immediately paid it over to Mrs. Hamer, the testator's widow. Mrs. Hamer and Mrs. Rawdon were entered in the Company's books as executrixes only.

Mrs. Hamer received four dividends, two in 1840 and two in 1841, by the hands of some person authorised by her.

On the 22nd of March, 1850, the Master discharged a former order, whereby Mrs. Hamer was included in the list as personally liable; and in lieu thereof placed Mrs. Hamer and Mrs. Rawdon on the list as personal representatives of the testator, together with Mrs. Rawdon's husband, as contributories for the twenty-five shares.

Mrs. Hamer died on the 11th of April, 1850.

On the 5th of June, 1850, the Master directed a call of 100*l.* per share, on each of the twenty-five shares, to be made upon Mr. and Mrs. Rawdon (such call being payable out of the personal estate of the said James Hamer, deceased.)

On this day a motion was made on behalf of Mr. and Mrs. Rawdon, by way of appeal from the order directing the above call.

July 4th.

The following admissions were made by the official manager:—

“That there is not now due and owing any debt of the said Company which was due at the death of the testator, James Hamer; and that all the liabilities in respect whereof contribution is now sought were incurred by the Company after the decease of the said testator; and that the Com-

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pany was duly dissolved, under the provisions of their deed of settlement, on the 14th of September, 1843."

Mr. *Russell* and Mr. *Hamilton Humphreys*, for Mr. and Mrs. *Rawdon*.—The testator's estate cannot be held liable for any part of the debts for which this call is made, inasmuch as the death of the testator operated as a dissolution of the partnership as to him, and he was not liable to any loss subsequently incurred. The provisions of the 21st article only refer to such demands as the testator was himself liable to; and there is no such demand in the present case remaining unsatisfied. Mrs. *Rawdon* did no act to make herself liable; and neither she nor Mrs. *Hamer* could make the testator's estate liable in respect of losses incurred after his death, because they had no authority to continue the assets in the concern. [They cited *Tatam v. Williams* (a), and *Madgwick v. Wimple* (b).] The case is not concluded by the decision of the Master placing the appellants upon the list; for, in *Hawthorn's case* (c), the Lord Chancellor said, the placing a contributory on the list did not determine the extent or amount of his liability; and as a call is now made, not to pay debts in respect of which the testator was liable, but to pay debts incurred since his decease, this is the proper time for insisting that his representative should not be included in the call.

Mr. *Bacon* and Mr. *J. V. Prior*, for the official manager, were not called upon.

The VICE-CHANCELLOR:—

The conduct of Mrs. *Hamer* and Mrs. *Rawdon* may or may not have been a breach of trust. That is not now in question. The question is, whether, by acts which they have done, the testator's estate has not continued to be involved in this speculation.

(a) 3 Hare, 347.

(b) 6 Beav. 495.

(c) 1 Macn. & G. 49.

Now it appears that Mrs. Hamer received dividends on the shares, becoming payable after the testator's death; and I fear that, by this course being taken, the testator's estate was involved, or continued to be involved, in this undertaking. If the executrixes assented to the bequest to themselves, I am afraid that Mr. Rawdon would be liable, without reference to the amount of assets which have been received. Assuming that there was not such an assent as was binding, then the testator's estate remains liable. In either view of the case, Mr. Rawdon must at least pay the call to the extent mentioned in the order. I cannot interfere with what the Master has done.

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Mr. Bacon and Mr. J. V. Prior, for the official managers, asked for costs.

The VICE-CHANCELLOR:—

The appellants must pay the official managers 40*s.* costs, and the official managers may have the rest of their costs out of the estate.

After this decision, the Master made another call of 35*l.* per share upon Mr. and Mrs. Rawdon.

To shew that they were not liable to pay this call, Mr. and Mrs. Rawdon, on the 14th of August, 1850, made an affidavit in the Master's office, stating, that, from the death of testator, and thenceforward down to about five months before the death of Mrs. Hamer, Mrs. Hamer had the sole and exclusive management and control of the personal estate and effects of said testator; and that the deponents did not, nor did either of them, in any manner interfere therewith, or receive any monies whatsoever on account thereof, except that, on one occasion, Mrs. Rawdon received a dividend upon the shares in the above Company, by the direc-

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tion and as the agent of and for Mrs. Hamer, to whom she handed over the amount. The deponents annexed a schedule to their affidavit, and deposed that it contained, to the best of their respective knowledge and belief, a full, true, correct, and detailed account of all the goods, money, property, and other personal estate of James Hamer, deceased; and that the whole thereof was received by or came to the hands of Mrs. Hamer in her lifetime, and was, as they believed, applied by her in manner in the same schedule set forth; and they said that they did not, nor did either of them, receive or apply any part of such moneys, estate, or effects; and they submitted that they were not liable now to account for the same, or for the application thereof. They further deposed, that they had not had, and had not then in either of their possession, any assets of James Hamer applicable to the payment of the call.

After the filing of this affidavit, the official managers served Mr. and Mrs. Rawdon with notice that they should, on the 13th of February, 1850, apply to the Master to make an alteration, in addition to the entry made by him in the course of settlement of the list of contributories, by adding the words "and devisee" after the words "personal representative," appended to the names of Mr. and Mrs. Rawdon respectively, and that they would, by such alteration, be settled on the list as contributories for the said twenty-five shares, in respect of Mrs. Rawdon being personal representative and devisee of James Hamer, deceased, or to make such other alterations as to the said Master shall seem just.

Mr. and Mrs. Rawdon appeared before the Master by counsel, and contested their liability to be placed upon the

list in respect of Mrs. Rawdon being a devisee of the testator; and after hearing the arguments of counsel on both sides, the Master gave a written judgment as follows:—

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“This is an application to include Joshua Rawdon, and Everilda Sarah, his wife, in right of the said Everilda Sarah, and James Hamer, as devisees of the real estate of the testator. That application is made in consequence of Mr. and Mrs. Rawdon (included in their representative character) having made an affidavit that there is no personal estate. The official manager, therefore, seeks to include the devisees, for the purpose of compelling payment of the calls out of the real assets.

“Although the testator executed the deed of settlement, yet it is said, that, inasmuch as the covenant does not bind the heir, the real assets cannot be reached.

“To this it is answered, that the 3 & 4 Will. 4, c. 104, has made all the real estate liable to simple contract as well as specialty debts.

“It is then argued that the debts, in respect of which it is sought to render the testator's real estate liable, had no existence at the time of his death, and therefore do not affect it; but it appears to me that the answer to this is, that the testator was a partner in this Company, contingently liable to debts which might be incurred during the term for which the partnership was formed; that debts were so incurred; and that his estate, both real and personal, are, by the before-mentioned statute, made liable to such contingent liabilities, or, in the words of the Act, ‘his heir or heirs, devisee or devisees, shall be liable to the same suits in equity, at the suit of any of the creditors of such debtor, whether by simple contract or by specialty, as &c.’

“In a suit in equity, the personal and real assets of this testator might be administered in payment of the debts of this Company. He was contingently liable to the debts of

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the Company which might be incurred after his decease. I propose to include these parties in the terms of the notice."

Mr. *Malins* and Mr. *Hamilton Humphreys* now moved, on behalf of the devisees, by way of appeal from the decision of the Master.

The devisees are not liable to be put upon the list of contributories.

Prior to the Statute of Fraudulent Devises, 3 Will. & M. c. 14, the devisees were not bound by the debts of their devisors.

By that statute, sects. 1 & 2, devises were declared to be fraudulent and void only as against creditors who would be thereby defrauded of their just debts; and it was decided, in *Wilson v. Knubley* (a), that the operation of this statute was confined to cases in which there was a debt actually due from the devisor at the date of the testator's decease; and that it did not even extend to a case in which an action of covenant, and not of debt, lay against the devisor at the time of his death.

The stat. 11 Geo. 4 & 1 Will. 4, c. 47, repealed the stat. of 3 & 4 Will. & M. c. 14; but the language of that statute, re-enacting the 3 & 4 Will. & M., made devises by debtors void as against their creditors, and did not extend the remedy as against the devisees of persons bound by specialty, and not actually indebted at the time of their decease; and the stat. of 3 & 4 Will. 4, c. 104, for rendering freehold and copyhold estates assets for the payment of simple contract and specialty debts, only charges such estates of devisors in the hands of devisees as assets "for the payment of the just debts of such persons, as well debts due on simple contract as on specialty;" and it was decided by *Farley v. Briant* (b), that, notwithstanding the two last-mentioned Acts,

(a) 7 East, 128.

(b) 3 A. & E. 839; S. C., 5 N. & M. 42.

devisees were not liable at law in respect of any debts which became payable by any breaches subsequent to the death of the devisor; in other words, that the freehold estates of devisors are not liable, in the hands of devisees, in respect of debts, which, at the date of the devisor's death, were only contingent.

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Now, in the present case, it is not contended that any debt was due from Mr. Hamer, the devisor, at the date of his decease.

The Act of 3 & 4 Will. 4, c. 104, renders the devisees liable to the same suits in equity, at the suit of the creditor, "as the heir or heirs-at-law, devisee or devisees, of any person or persons who died seised of freehold estates, was or were, before the passing of this Act, liable to, in respect of such freehold estates, at the suit of creditors by specialty, in which the heirs were bound." Now it has been shewn, that, prior to that Act, the devisee was not bound in respect of a contingent debt of his devisor, and thus this enactment does not carry the case further against the devisee.

Under the partnership deed executed by him, Mr. Hamer's obligation was a specialty debt, but the heirs were not named therein nor expressly bound thereby. It is true, that, in *Morse v. Tucker* (a), the Vice-Chancellor Wigram held, that damages recovered in an action of covenant after the devisor's death, constituted a debt payable out of the real estate of the devisor, under the charge of debts on his real estate contained in the will; but that decision depended on the fact, that the devisor actually charged his debts upon his real estates by his will; a fact which distinguishes the case from *Farley v. Briant*.

Even if these difficulties be surmounted, still these devisees cannot be placed upon the list as contributories. In bankruptcy, a contingent debt was not proveable until an express provision in the Act of Parliament enabled such

(a) 5 Hare, 79.

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debts to be proved. Although one of the definitions of the word contributory is a "devisee," it is submitted, that that only means a devisee of such shares when they are realty.

Mr. Bacon and Mr. J. V. Prior, for the official manager. — *Wilson v. Knubley*, and *Farley v. Briant*, do not affect the present case.

The personal estate of the testator is shewn to be exhausted. The Company is therefore entitled to come against his real estates devised. The circumstances here are similar to those in *Morse v. Tucker (a)*. In *Farley v. Briant*, the 3 & 4 Will. & M., and the 3 & 4 Will. 4, c. 43, were chiefly referred to; but if the attention of the Court had been more particularly directed to the 1 Will. 4, c. 47, ss. 1 and 2, the decision would probably have been different. [They also cited *Willson v. Leonard (b)*, *Eardley v. Owen (c)*, and *Birmingham v. Burke (d)*.]

The VICE-CHANCELLOR:—

In this case, considering the Master's report, I think it right to assume, that neither the debts nor the liabilities which subsisted at the time of the testator's death, now exist. I think it right also to assume that they have been discharged, not by any person in the character of surety, (for if that were so, they might be considered, in a sense, as still alive,) but paid in the regular and ordinary way, out of funds properly applicable to their payment.

The whole question stands on the statute law, the 11 Geo. 4 & 1 Will. 4, c. 47, the 3 & 4 Will. 4, c. 104, and the Joint-stock Companies Winding-up Acts; and it is a question which I have often had occasion to call one of internal liability, that is, one of contribution, not an external question—not a question whether the devisees are liable to any proceeding by a creditor of the Company, as such creditor.

(a) 5 Hare, 79.
 (b) 3 Beav. 373.

(c) 10 Beav. 572.
 (d) 2 J. & L. 699.

The testator died so long ago as 1838; since which time the executrixes have been admitted by the Company as the holders or proprietors of his shares, probably in their representative character, but still as proprietors, for years. The Company was treated as solvent, that is, it was treated as being in a state to yield profits as profits, and, in fact, profits have been received, from time to time, by one of the executrixes, for years since the death of the testator.

It is after this length of time, and after this course of proceeding, that those who represent the Company, a Company having thus dealt with the executrixes, allege that the devisees, who had no control over the shares, and who could have received no benefit from them, they being personal estate, are liable in respect of them.

I am of opinion that it is not for a Court of equity, at their instance, to assert any such liability. It could be only upon equitable considerations properly belonging to such a case, that a bill could be filed. With deference, I differ from the Master, and decide that the devisees cannot, as devisees, be placed on his list as contributories.

The costs of both parties must be paid out of the estate.

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1849.

Jan. 11th.

JAMES v. GRISSELL.

Upon a motion, by way of appeal from the Master's decision, refusing to enlarge publication, the Court received in evidence new facts not before the Master, on which the Court directed the publication to stand enlarged; but, as the order was obtained upon materials which were not before the Master, the appellant was ordered to pay the costs of the motion.

UPON an application by the plaintiff to enlarge publication, the Master refused the order asked.

This was a motion by the plaintiff, by way of appeal from the Master's decision.

Mr. *Mackeson*, in support of the motion, read the affidavits which had been used in the Master's office, and also other affidavits verifying additional facts.

Mr. *Rogers*, for the defendant.

The VICE-CHANCELLOR:—

On the materials before the Master I should have come to the conclusion at which he has arrived.

New facts have now been brought before the Court by further affidavits, which, in conformity with what is stated to be the practice, I have received: and, on the whole evidence, the publication should, I think, be enlarged. But, as the order now obtained is made upon materials which were not before the Master, the plaintiff must pay the costs of this application.

1849.

LADBROKE v. SLOANE.

Jan. 11th.

THIS was a creditor's suit against the personal representative of a deceased testator for the administration of his estate.

The defendant had put in an answer to the bill, and replication had been filed on the 4th of November, 1848.

The usual administration decree was then obtained in a cause of *Phillips v. Sloane*, being another creditor's suit against the same personal representative.

The plaintiff's solicitor was served with notice of the decree in *Phillips v. Sloane* on the 14th of November, 1848; and with a further notice, that if the plaintiff proceeded in his suit, a motion would be made by the defendant in both suits for an order to stay the first suit, with costs. The plaintiff thereupon suspended the preparation of interrogatories for the examination of witnesses, for which he had given instructions to counsel. A correspondence ensued, in which the plaintiff's solicitor offered to abandon the first suit, and to go in and take the benefit of the decree in *Phillips v. Sloane*, provided his costs were paid; but the defendant's solicitor declined to agree to the proposal. On this intimation the plaintiff's solicitor stated his intention to proceed.

A motion, of which the notice had been intitled in the first cause only, was now made for an injunction staying the proceedings in it.

Mr. J. V. Prior, in support of the motion.—The defendant in both suits is clearly entitled to have the proceedings in this suit stayed. The intimation given by the plaintiff in the first suit, of his intention to proceed, after having notice of the decree in the other suit, has rendered this motion necessary. It has been settled, that a creditor thus proceeding cannot have his costs: *The Earl of Portarlington v.*

A creditor's suit against a personal representative for the administration of a testator's estate proceeded to replication, when a decree was obtained, in another creditor's suit, against the same personal representative for the same object. After the defendant had given the plaintiff in the first suit notice of the decree, the plaintiff threatened to proceed; and thereupon the defendant, upon a notice of motion, intitled only in the former cause, asked that the proceedings might be stayed. The Court made an order in both suits, granting the injunction, and giving the restrained plaintiff liberty to tax his costs of the first suit and on the motion, and to go in and prove his debt and such costs in the second suit, but declined to direct that the costs should be paid out of the first assets.

declined to direct that the costs should be paid out of

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 LADBROCK
 v.
 SLOANE.

Damer (a). A motion for an injunction against proceeding does not require the payment of the plaintiff's costs as a preliminary: *Drewry v. Thacker* (b).

Mr. *Lovat*, for the plaintiff.—An injunction to restrain a creditor from proceeding at law after a decree is never granted without an affidavit by the executor of the state of the assets: *Paxton v. Douglas*, and *Cleverley v. Cleverley* (c). The same rule is applicable where a proceeding in equity is stayed after a decree. No such affidavit has been made on this motion.

In the same case of *Paxton v. Douglas*, Lord *Eldon* stated it as a general rule, that the party seeking to restrain a creditor from proceeding, must pay the costs up to the time when notice is given of the decree having been obtained.

The motion is intitled inaccurately, it should have been intitled in both suits.

The VICE-CHANCELLOR said, he thought that an affidavit should be made by the executor, stating the particulars of the testator's assets, and that the order should be intitled in both causes.

As to the costs, one might have expected to find some settled rule; but questions as to the mode of providing for them were of frequent occurrence.

The order was to stay the proceedings in this suit; to direct a reference to tax the costs of the suit, including those of the present motion; and to declare that the plaintiff in this cause was to be at liberty to go in before the Master in the cause of *Phillips v. Sloane* to prove his debt and his costs when taxed.

Mr. *Lovat* asked that the order might contain a direction that the costs should be paid out of the first assets.

The VICE-CHANCELLOR declined to give any direction to that effect.

(a) 2 Ph. 262, 265. (b) 3 Swanst. 529, 541. (c) Cited 8 Ves. 520.

1849.

YETTS v. NORFOLK RAILWAY COMPANY.

Jan. 15th.

THIS case came on upon two demurrers to a bill filed by a holder of new 20*l.* shares in a Company incorporated by Act of Parliament, called the Norfolk Railway Company, on behalf of himself and the other holders of new 20*l.* shares in the Company, except such of them as were defendants, against the Company, the directors, and certain other holders of the new shares.

The bill stated, that, on the 23rd of February, 1847, there was due from the Company on mortgages and bonds various sums, payable at different periods in 1848, 1850, and 1851, and amounting together to 197,000*l.* That on that day resolutions were passed at a half-yearly general meeting of the Company, and among them one (the 7th) to the effect, that the Company should raise additional capital to the amount of 197,000*l.* by new shares of 20*l.* each, to be applied in the payment of the then present mortgage debt of the Company; and that there should be a deposit of 5*l.* on each share, the remainder to be called for by the directors as occasion should require, for effecting the objects of the resolution.

The bill further alleged, that the new shares were accordingly issued, and were called new 20*l.* shares, 1847; that Mr. Yetts, one of the plaintiffs, on the faith of this resolution, subscribed for thirty-nine of these shares, and paid up 195*l.* as his deposit; and that similar payments were made by other persons, on the same understanding, upon other shares, to the number of 8719 in the whole; and that Mr. Yetts had, upon the faith of the same resolution, also bought other new 20*l.* shares.

An incorporated railway Company issued new shares, in pursuance of a resolution declaring the purpose of such new issue to be the raising of a sufficient amount to pay off the existing mortgage and bonds of the Company.

The holder of some of the new shares filed a bill, on behalf of himself and other holders of the shares, against the directors and the Company, alleging facts to shew, and charging, that they were about to apply the money paid in respect of the shares otherwise than in conformity with the resolution, and praying for a declaration that the money ought to be applied according to the terms of the resolution, and for a specific performance of the agree-

ment thereby entered into, and for an injunction:—*Held*, allowing demurrers of the directors and the Company, that the case fell within the authority of *Mozley v. Alston*, but the costs of only one demurrer were allowed.

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v.
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RAILWAY Co.

The bill further alleged, that in June, 1848, the first call of 5*l.* per share was made, and was paid by the plaintiffs and other shareholders, and that the total amount realised was 60,715*l.*, which was more than sufficient to pay such of the sums as had then become payable on mortgages and bonds, for the payment of which the shares were issued.

The bill further alleged, that, on the 6th of November, 1848, a second call of 5*l.* per share was made for the 15th of December following.

The bill then alleged, that the defendants were about to apply the money thus raised to other purposes than those mentioned in the 7th resolution; and that, on the 14th of November, 1848, the secretary had written to one Mr. Maxwell a letter, containing the following passage:—

“The Company have to meet liabilities, consisting of a re-payment of a temporary loan, and of law agents’ bills, which must be provided for, and they have no other source open to them than by making a call upon these shares.”

The bill also charged, that the defendants threatened to sue the shareholders at law for the last call, and to declare the shares forfeited, and to withhold the dividends payable to the plaintiffs.

The prayer was for a declaration that the 7th resolution was binding, as a contract between the Company and the holders of the new shares, as to the application of the capital to be raised thereby, and as to the time of raising such capital. The bill also prayed, that such contract should be decreed to be specifically performed; and that the defendants might be restrained from prosecuting certain threatened actions at law, and from declaring forfeited the plaintiffs’ shares, and from withholding of the dividends, and from applying the capital in their hands in any manner otherwise than according to the 7th resolution.

To this bill the Company and the directors demurred separately.

Mr. *Bacon* and Mr. *Speed* in support of the demurrers.—The intended acts with which the defendants are charged, if wrong, are a wrong to the Company generally, and, therefore, not the proper subjects of a suit framed as the present is: *Mozley v. Alston* (a), *Foss v. Harbottle* (b), *Exeter and Crediton Railway Company v. Buller* (c), *Lord v. Copper Miners' Company* (d).

Moreover, the suit is defective as regards the parties to it.

Mr. *Wigram* and Mr. *Campbell* for the plaintiffs.—The cases cited do not apply. The intended wrong is one which the Company at large are about to commit against the particular class of shareholders which the plaintiffs represent. It is not a case, therefore, in which they could sue in the name of the Company; nor one in which the acts complained of could be made binding upon the shareholders in the same position as the plaintiffs, by any resolution of the Company at large, being, as the plaintiffs insist, a breach of the contract entered into between that class and the rest of the Company.

The VICE-CHANCELLOR:—

I give no opinion upon the question as to the parties to the suit. Upon the question of equity, I am not sure that, independently of recent authorities which have been cited at the bar, I should not have held the demurrers sustainable; but those decisions, and the judicial opinions expressed with reference to them are, as it appears to me, inconsistent with sustaining the bill. What course I should have taken in a different state of the authorities, it is needless to say. As it is, I allow the demurrers; but I do not understand why there should have been two. The costs of one only can be allowed.

(a) 1 Phil. 790.

(b) 2 Hare, 461.

(c) 11 Jur. 527.

(d) 2 Ph. 740; and see *Ed-*

wards v. Shrewsbury and Birmingham Railway Company, 2 De G. & S. 547, n. (b).

1849.

Jan. 19th.

TEVERSHAM v. CAMERON'S COALBROOK STEAM COAL
AND SWANSEA AND LOUGHER RAILWAY COMPANY.

The 29th section of the Joint-stock Companies Registration Act, 1849, requiring any contract or dealing between a Company and any director (except as therein mentioned), to be submitted to a meeting of shareholders, extends to a loan of money from a director to the Company.

THIS was the demurrer of the defendants, a Company formed under the 7 & 8 Vict. c. 110, called Cameron's Coalbrook Steam Coal and Swansea and Lougher Railway Company, to a bill, filed by three of the directors of the Company, named Teversham, Lund, and Hart, praying for an account of the sums advanced by the plaintiffs to the Company under an agreement, for an account of monies received by the Company in respect of calls, and for payment to the plaintiffs of the sums due to them, and for an injunction to restrain the Company from receiving the monies payable in respect of the calls.

The agreement in question was entered into under a general resolution of the Company, passed in July, 1847, whereby the directors were authorised to borrow on mortgage, bond, or other assurance, such sums, at such periods and rates, as they should deem expedient.

Upon the faith of this resolution, the plaintiffs made the advance in question to the Company, upon an agreement that it should be a lien on the calls.

The bill stated the above circumstances, but it did not allege that the agreement had been confirmed as required by the 7 & 8 Vict. c. 110, s. 29, which provides, that if any director "be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the Company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract, in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director; and that, if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article or of

Murray's Exors' Case 5 D. M. 49. 751.
Hulke's Case 2 L. & W. 311.

service, which is respectively the subject of the proper business of the Company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers,) shall be entered into, in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force, until approved and confirmed by the majority of votes of the shareholders present at such meeting."

The question was, whether the agreement between the plaintiffs and the Company required to be confirmed under this section.

Mr. *Russell* and Mr. *W. W. Cooper*, in support of the demurrer, contended, that the section applied to all contracts and dealings except those particularly specified in sect. 29, and exempted from the scope of the Act.

Mr. *Swanston* and Mr. *H. Prendergast*, for the plaintiffs, contended, that the words "contract or dealing" in the second branch of the section, must be construed by referring to the description of the transactions mentioned in the former part of the clause, viz. "for land, materials, work to be done," or other similar objects, and did not refer to a loan of money.

The VICE-CHANCELLOR thought, that the agreement fell within the meaning of the section, and allowed the demurrer.

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Jan. 20th.

GRAYSON v. DEAKIN.

A testator, being seized of copyhold lands, which, on his death, became subject to customary freebench, gave to trustees the residue of his real and personal estate upon trust to invest the money in the funds, and to receive the dividends thereof, and the rents of his real estate; and, after payment of his debts and testamentary expenses, to pay to his widow, during her life, the annual sum of 20*l.*, and to pay the residue of such annual produce to his son, and, after his death, the trustees were to hold the said real and personal estate upon trusts for the children of his said son. The will contained the following declaration:—
“I empower my said trustees to lease

any lands, which they may hold upon the trusts of this my will, for not more than twenty-one years, at rack rents.”—*Held*, that, with this power of leasing in the will, the widow was put to her election between the annuity given to her by the will and her freebench.

Observations on *Holditch v. Holditch*, 2 Y. & C. C. C. 22.

MR. WILLIAM GRAYSON, deceased, made his will, dated the 26th of October, 1839, and thereby, after directing the payment of his funeral and testamentary expenses, and after specifically devising a part of his real estates, and giving certain pecuniary and specific legacies, he gave, devised, and bequeathed to Martha Deakin, James Benn, George Grayson, and John Ford, their heirs, executors, administrators, and assigns, all the residue and remainder of his real and personal estate, upon trust to invest the money in the funds, and to receive the dividends thereof, and the rents and annual produce of his real estate; and, after payment of his just debts, funeral and testamentary expenses, to pay to Mrs. Ruth Grayson, (the testator's wife,) during her life, the clear annual sum of 20*l.*, and then to pay to the said Martha Deakin an annuity of 100*l.*, and to pay the residue of such annual produce to William Grayson (the testator's son) for his life, and, after his death, to hold the real and personal estate so devised and bequeathed upon trust for the benefit of the children of the testator's son William Grayson; with a trust to sell the real estate when the youngest child of the said testator's son William Grayson should attain the age of twenty-one years. The will contained the following declaration: “And I do declare and hereby empower my said trustees, to lease any lands which they may hold upon the trusts of this my will, for not more than twenty-one years, at rack rents, subject to the usual covenants.”

The testator died in 1843, leaving his widow Ruth Gray-

Gibson v. Gibson 1 Drewry 45. *Pepper v. Dixon*
17 Sim. 206. *Parker v. Lowndes* 4 S. M. 24. 324.
Honywood v. Foster 30 Rees. 17.

son, his son William Grayson, and several children of William Grayson, the son, surviving.

At the date of his will, the testator was entitled to freehold estates, conveyed to him to uses in bar of dower. He was also entitled to certain copyhold estates, held of the manor of Wimbledon (which were subject to freebench according to the custom of the manor, and which custom followed the law of dower at common law).

The above suit was commenced in 1845, by William Grayson, the son, against the trustees and executors of the will, and his six children, the infant grandchildren of the testator; and a decree was made in 1846, for the administration of the real and personal estate of the testator.

Mrs. Grayson, the widow of the testator, was not made a party to the suit, but she received the annuity of 20*l.* given to her by the testator's will, from his death.

A portion of the testator's copyhold estate was contracted to be sold to the Richmond Railway Company in 1847; and thereupon the Company suggested, that Mrs. Grayson was entitled to freebench out of the copyhold land, and required her to join in the surrender and assurance, and to release her freebench.

Mrs. Grayson was not previously aware that she had any title to freebench.

Mr. William Grayson, the plaintiff, thereupon presented the present petition in the cause, and after setting forth the testator's will, and the above, among other circumstances, stated, that it was doubtful whether Mrs. Grayson, the testator's widow, was entitled to her freebench, and also to her annuity, or whether she was bound to elect between them, and prayed, that it might be declared, that she was bound to elect between the annuity and her freebench.

This petition was presented under an agreement between the plaintiff and the defendants in the cause and Mrs. Grayson, that she should appear upon the petition, and that all

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parties should be bound by the decision upon the hearing of the petition.

On the petition coming on to be heard, a question was raised, whether, as some of the defendants, who were beneficially interested, were infants, it was competent for them to concur in the agreement.

The VICE-CHANCELLOR, however, consented to hear the petition in the first instance, and to allow that question to stand over to be discussed, in case his decision should be unfavourable to the claims of the infants.

Mr. *Russell* and Mr. *Anderson*, in support of the petition.—The power given in the will to the devisees in trust, to lease the testator's lands, shews a clear intention by implication on the part of the testator to exclude his widow from all benefit out of them, beyond the annuity which the testator gave her by his will. This implication puts the widow to elect between her dower and the annuity. The present case is entirely within the decision of Sir *Edward Sugden* in *Hall v. Hill* (a). In that case, the testator gave his trustees a power of leasing "all or any part of his said estates and lands." Here, the power is "to lease any lands which they (the trustees) may hold;" but the difference creates no distinction between the two cases. In the present case, the testator, in a previous part of his will, specifically devised certain parts of his lands; and the power is co-extensive with all the testator's lands given to his trustees. [They also cited *Holditch v. Holditch* (b), *Taylor v. Taylor* (c), *Lowes v. Lowes* (d), *O'Hara v. Chaine* (e).]

Mr. *Phillips* and Mr. *Bichner* for the defendants in the cause in the same interest with the petitioner.

(a) 1 Dru. & War. 94.
 (b) 2 Y. & C. C. C. 18.
 (c) 1 Y. & C. C. C. 727.

(d) 5 Hare, 501.
 (e) 1 J. & L. 662.

Mr. *Bacon* and Mr. *Archibald Smith* for Mrs. Ruth Grayson the widow. *Hall v. Hill* is in substance the only case cited in argument against the widow's right both to the annuity and to her freebench. Now, on referring to the judgment in that case (a), it is clear, that the power of leasing was only one of several provisions in the will, which together constituted the grounds of the decision of the learned Judge. His Lordship says, "Upon looking at the whole of this will, and spelling out the intention from its several provisions, the widow is barred of her dower; and I have come to that conclusion not alone from the circumstance, that an annuity has been given to her, nor because a part of the estate has been devised to her, but from a full consideration of the different parts of the will." We learn from his Lordship's judgment that the cases that led to the decision against the widow's right to both benefits were *Miall v. Brain* (b), in which Sir *John Leach* came to the conclusion at which he arrived, because he thought the testator contemplated for his daughter the personal use, occupation, and enjoyment of a devised house, which was inconsistent with the widow's right to dower out of that house; and *Butcher v. Kemp* (c), in which the same learned Judge followed his own previous decision, under a will in which the testator directed his trustees to carry on the business of his farm, or to let the same upon lease. Now, in these cases, the ground for putting the widow to her election was the inconsistency of a right to dower in a house with its personal occupation by another, or of dower in a farm with carrying on the business of that farm by another. The decision in each of these cases is put on a ground other than the power of leasing; and *Hall v. Hill* is expressly put on the construction of the whole will.

It is clear, that a power of sale alone in the will, would not have put the widow to her election, and there is no dis-

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(a) See 1 Dru. & War. 105. (b) 4 Madd. 119. (c) 5 Madd. 61.

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inction unfavourable to the widow between such a power and a power of leasing. If an intention may be implied, that the trustees should sell subject to the widow's dower or freebench; there is no reason why a similar implication should not arise where a power of leasing is given.

Mr. *Russell* in reply.—It is clear that Sir *Edward Sugden* intended to decide the principle, that a power of leasing in a will put a widow taking a benefit under the will to her election between that benefit and her dower. Sir *E. Sugden* had occasion to reconsider his decision in *Hall v. Hill*, in *O'Hara v. Chaine(a)*, which came before him three years afterwards; and he said: "The case comes within the principle of *Hall v. Hill*, and I see no reason to depart from that decision."

[*Villareal v. Lord Galway(b)* was also referred to in the course of the argument.]

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The first question, if question it can be called, is, whether, if the power of leasing had been out of this will, the widow would have been barred. As to this, whatever might have been thought of it independently of authority, the authorities render it, at the present day, impossible to suggest that she would have been put to her election.

The next question then is, whether the power of leasing does put her to her election: A question which makes it necessary to consider whether the case comes within the decision of *Hall v. Hill*. I am of opinion, that the difference of language between the power here and that in *Hall v. Hill* does not create a distinction substantial enough to be acted on. The language of the power in *Hall v. Hill* was "I also give to my said trustee Charles Newman full

(a) 1 J. & L. 662.

(b) Amb. 682; S. C., 1 Bro. C. C. 292, n.

power and authority to lease, demise, or set all or any part of my said estate and lands for any term not exceeding thirty-one years in possession and not in reversion, and without fine (a).” The language here is, “I do declare and hereby empower my said trustees to lease any lands which they may hold upon the trusts of this my will.” Now, there is possibly an arguable distinction between the two modes of expression, but it seems to me, as I have said, not sufficiently substantial; and I consider the decision in *Hall v. Hill* to have proceeded in the main, if not solely, on the power of leasing.

In *Holditch v. Holditch* (b), I am reported, with reference to *Hall v. Hill*, to have said, “In *Roadley v. Dixon* and *Hall v. Hill*, the decisions, in both of which I entirely agree, proceeded on the ground of distinction to which I have adverted. The decision in *Roadley v. Dixon* turned on the mode of managing a farm, that in *Hall v. Hill* on the power of leasing; both of which, though clearly within the contemplation of the testator, would be substantially disappointed by the claim of dower.” The manner in which I ought to have expressed myself, in order to demonstrate clearly what was then passing in my mind, was this, “I agree with the judgment in *Roadley v. Dixon*, and I express no dissent from *Hall v. Hill*, believing that this decision does not in the slightest degree contravene *Hall v. Hill*.”

I think that I am now placed in a position in which in *Holditch v. Holditch* I was not placed. It appears to me, that I cannot decide in favour of the widow here, without substantially contravening *Hall v. Hill*, which has been expressly recognised in the subsequent case of *O'Hara v. Chaine* by the same learned and eminent judge, whose decision it is. The weight of his authority ought to over-

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(a) 1 Dru. & War. 97.

(b) 2 Y. & C. C. C. 22, 23.

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balance any doubt or difficulty of my own. Considering that this case is governed by *Hall v. Hill*, I follow that decision, and hold the widow to be put to her election.

Jan. 22nd.

NUNN v. TRUSCOTT.

The landlord of a workshop, which he held under a lease, agreed in writing to underlet it at a yearly rent, with an option to the tenant to take an underlease upon the same terms for twenty-one years from the previous Lady-day. The tenant continued in possession under this agreement for four years, when he received notice to quit. He then applied to his landlord for a lease for twenty-one years, according to the agreement. Some months afterwards, the landlord obtained possession of the premises under a warrant of possession from a District Court. The tenant filed a bill against the landlord for specific performance and an injunction. It appeared, at the hearing, that the tenant had not kept the premises in repair. The Court dismissed the bill with costs, and expressed a doubt whether the plaintiff had not, by his delay alone, lost his option to renew.

THE defendant, John Truscott, being, in the month of May, 1843, entitled, as a leaseholder, to a workshop, consented to let it to the plaintiff, Thomas Nunn, and signed the following agreement:—

“Memorandum, London, 23rd of May, 1843.—I agree to let to Mr. Thomas Nunn the workshop and premises late in the occupation of Mr. J. C. Harman, situate in Edward-street, York-road, Lambeth, at the yearly rental of 28*l*., payable quarterly, with the option of Mr. T. Nunn taking a lease upon the same terms for twenty-one years, commencing from Lady-day last past. If I should think fit to let the dwelling-house in front of the above premises at the yearly rental of 22*l*. per annum, for the same term as the above premises is agreed to be let, Mr. Nunn is willing to take the same, subject to such terms as herein named. Rent to commence from the time possession is given.

(Signed) JOHN TRUSCOTT.”

The plaintiff thereupon entered into possession of the workshop as tenant under the agreement, and so continued, and paid the rent reserved to the defendant.

Prior to the 29th of September, 1847, the plaintiff received from the defendant a notice in writing, requiring him to quit the workshop and premises at Lady-day then next.

In the month of October, 1847, the plaintiff applied,

through his solicitor, to the defendant, expressing his intention to exercise the option given to him by the agreement, and to take a lease of the workshop, and requesting the defendant to send a draft of a lease to the plaintiff's solicitor accordingly; but the defendant declined to grant the lease.

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In the month of May, 1848, the defendant, as landlord of the premises, entered a plaint in the Southwark District Court, under the statute 9 & 10 Vict. c. 95, to recover possession from the plaintiff of the workshop and premises.

The plaintiff, on the 18th of May, 1848, filed the present bill, stating the above circumstances, and praying the specific performance of the agreement, and for an injunction in the mean time, restraining the defendant from taking or continuing any proceedings for the recovery of the possession of the premises.

The defendant by his answer alleged, by way of defence, that the plaintiff had underlet the premises without his consent, and had suffered the buildings to fall into great decay and dilapidation, so as to expose the original lease of the defendant to forfeiture; and the defendant insisted, that, under the circumstances of the case, the plaintiff had lost his right to continue in possession of the workshop, and that the defendant had become entitled to eject the plaintiff therefrom. The defendant denied that the plaint was still pending in the County Court, inasmuch as final judgment had been given thereon in favour of the defendant, on the 16th of May, 1848; and he stated that a writ or warrant of possession had been issued accordingly, under which he was in the actual possession of the workshop.

Both parties went into evidence. For the plaintiff it was proved, that he had caused many alterations and repairs to be made and done to the premises: but it was proved on behalf of the defendant, that the estate had become deteriorated to the extent of from 50%. to 100%. from want of repairs.

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The case now came on for hearing.

Mr. *Russell* and Mr. *Martindale* contended, that the plaintiff was entitled to have the agreement specifically performed. The Court will not refuse to enforce an agreement for a lease, unless it be perfectly clear that the lease, if granted, would be at an end by the clause of re-entry. The evidence in this case does not lead to such a conclusion. Mere want of repair would not create a forfeiture under such a lease as the Court would direct to be granted; and the other complaints made by the defendant do not amount to any ground of forfeiture. In *Gourlay v. The Duke of Somerset* (a), the Court granted and continued an injunction against ejecting a tenant holding under an agreement for a lease, where the injury to the estate by the tenant was much greater than has been caused here, even if all the defendant's case were admitted.

Mr. *W. M. James* and Mr. *Steele*, for the defendant.

The VICE-CHANCELLOR said, he was not sure that the plaintiff was right in having delayed the exercise of his option for so long a period as he had done. He thought that the defendant must be taken to have entered into the agreement in expectation that the plaintiff would keep the property in repair, which it appeared he had not done.

The bill was dismissed with costs.

(a) 1 V. & B. 68.

1849.

MOREHOUSE v. NEWTON.

Jan. 27th.

THIS was a suit seeking to have the accounts taken of the partnership dealings and transactions between the plaintiff and his partner, since deceased. The accounts having been taken, the case now came on upon exceptions to the Master's report; and the principal question argued was, whether a certain account current, which had been furnished by the plaintiff to the executors of his deceased partner before the institution of the suit, was admissible in evidence against the plaintiff, and to what extent.

It appeared that the accounts of the partnership had been carelessly kept; and that, there being no means of making them out from the books, the Master required all books and papers relating to the partnership to be brought in, and each party to make out, from them and any other evidence which could be obtained, the state of the accounts. The defendants thereupon produced the account current, and on the evidence afforded by the debit side of it, charged the plaintiff with two sums of 300*l.* and 400*l.* which the Master allowed, without permitting the plaintiff to discharge himself by the payments entered on the credit side of the account current.

Where the accounts of a partnership between two had been carelessly kept, and, after the death of one, the other furnished to the executors of the deceased partner an account current of the partnership dealings, which afforded them the only evidence to charge the surviving partner:—*Held*, that they were entitled to use it for that purpose in a suit instituted by the surviving partner to have the accounts taken, without being bound by the entries on the credit side of the account current.

Mr. *Bacon* and Mr. *Malins*, for the exceptions, cited *Beardman v. Jackson* (a), *Carter v. Lord Colrain* (b), *Randle v. Blackburn* (c), *Kilbee v. Sneyd* (d); and contended, that the document not being an answer or examination must be wholly admitted in evidence or not at all.

Mr. *Swanston* and Mr. *W. H. Bennett* appeared for one defendant.

(a) 2 Ball & B. 382.

(b) Barnard. Chan. Rep. 126.

(c) 5 Taunt. 245.

(d) 2 Moll. 186, 193.

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Mr. *Russell* and Mr. *F. Jones* for another defendant.

The VICE-CHANCELLOR held, that the Master had properly, upon the evidence of the account current, charged the plaintiff with the two sums in question, and was not bound to receive the items on the credit side of the account as conclusive evidence for the plaintiff.

Jan. 31st.

LONG v. STORIE.

A rector, who was also the patron of a living, gave warrants of attorney to various creditors, who had mortgages on the advowson, subject to an agreement that the judgment to be entered up by the first mortgagee should have priority over the rest, whenever execution should be issued:—
Held, that the agreement pointed so particularly to making the judgments charges on the living, that the Court could not give effect to it by granting an injunction and a receiver.

THIS was a foreclosure suit instituted by a mortgagee of the advowson of the parish church of Camberwell. The mortgagor was the incumbent of the living as well as owner of the advowson. He had also given to the mortgagee a warrant of attorney to confess judgment. There were other subsequent incumbrancers upon the advowson, to whom also warrants of attorney had been given, and who, with the mortgagor, were made defendants.

Judgments had been entered up upon all the warrants of attorney; and one of the puisne incumbrancers having issued a sequestration, a motion was now made on behalf of the plaintiff for a receiver and an injunction.

According to the statements in the bill, and the affidavits in support of the motion, the warrants of attorney were all given on the same day, and upon an express agreement between the plaintiff the subsequent mortgagees, and the mortgagor, that, whenever execution should be issued under the warrants of attorney, the execution to be issued on the plaintiff's judgment should have priority over the others. In order to insure this result the judgment-papers were deposited with a Mr. Daniel, the plaintiff's solicitor.

The bill and affidavits also alleged, that Mr. Hoare, one of the defendants, acting as solicitor for several other defendants claiming to be mortgagees on the advowson, repre-

sented to Mr. Daniel that the mortgagor was in a state of embarrassment; and that, unless sequestrations were immediately issued under the judgments, other creditors would get priority. That, in consequence of these applications, Mr. Daniel sent the judgment-papers to Mr. Hoare. That Mr. Hoare, by obtaining possession of such judgment-papers, and in violation of the agreement respecting the priority of the plaintiff's judgment, changed the order of the judgments, and gave two puisne mortgagees priority in issuing sequestration.

The prayer of the bill was for foreclosure of the equity of redemption in the advowson, a declaration that the plaintiff was entitled to priority over the other judgment creditors as regarded the income of the benefice, and for an injunction to restrain the other judgment creditors from recovering from the sequestrator the money in his hands.

Mr. *Russell* and Mr. *Follett* supported the motion for a receiver and an injunction, according to the prayer of the bill.

Mr. *Swanston*, Mr. *Tripp*, Mr. *Grove*, and Mr. *J. V. Prior*, for the different defendants.

The agreement relied upon is one for giving validity to a judgment as a charge upon a benefice, and is therefore invalid: 13 Eliz. c. 20; 57 Geo. 3, c. 99. In *Alchin v. Hopkins* (a), several creditors signed an agreement not to sue, arrest, or molest the defendant, in consideration that the future income of the defendant should be received and applied in liquidation of his debts. It was found, at the trial of the cause, that the defendant had no other income than the profits of a benefice with cure of souls; Lord Chief Justice *Tindal* there held, that the agreement must

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(a) 1 Bing. N. C. 99. See *Hawkins v. Guthercole*, 1 Sim. N. S. 63, and cases there cited.

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be considered to refer to the income of the defendant arising from his living, and no other. In *Newland v. Watkin* (a), a warrant of attorney, expressly pointing at the proceeding by sequestration, was held invalid.

The VICE-CHANCELLOR, in the course of the argument, referred to *Metcalf v. Archbishop of York* (b); and at its close said, that the alleged agreement respecting the judgments pointed so particularly to a charge upon the benefice, that the Court could not, without giving its aid to simony, accede to the application.

Motion refused, costs reserved.

(a) 9 Bing. 113.

(b) 1 Myl. & Cr. 547.

Feb. 9th &
 10th.

WYNNE v. PRICE.

A shareholder in an incorporated Railway Company instructed a stock-broker to sell his shares. The broker agreed with a jobber for the sale of them; but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B.

THIS was a suit instituted by the vendor of railway shares against the purchaser, for the purpose of compelling the latter to register himself, so as to become a shareholder, according to the provisions of the 8th section of the Companies Clauses Consolidation Act, 1845, which provides, that every person who shall have subscribed the prescribed sum, or upwards, to the capital of the Company, or shall otherwise have become entitled to a share in any Company, and whose name shall have been entered on the register of shareholders mentioned in the Act, shall be deemed a shareholder of the Company (a).

(another broker), who, as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; and the jobber granted the time on B. giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B., who paid the price to the vendor, and took the deed of assignment executed by the vendor:—*Held*, upon a bill filed by the vendor, that B. was bound to execute the assignment, to procure himself to be registered, and to pay the calls made since the execution of the assignment by the vendor, and to indemnify the vendor against future calls; and a decree was made to that effect.

(a) See also sects. 9, 14, 15, 22, and 28.

Sanderson's Case Ante p. 74. 76.
Evans v. Wood 5 L. Rep. 29. 14
Hawkins v. Malby 3 L. Rep. Ch. 190
Coles v. Bristow 6 L. Rep. 29. 162

The following was the substance of the allegations of the bill:—

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In September, 1845, the plaintiff, Mr. Edward Bristow Philip Wynne, was entitled to 100 shares, numbered from 17,761 to 17,860, in the Newry and Enniskillen Railway Company, which was incorporated by Act of Parliament, and thereby made subject to the provisions of the Companies Clauses Consolidation Act, 1845. His name was entered in the register of shareholders of the Company as the owner or proprietor of those shares.

In September, 1845, he gave instructions to Mr. Satterthwaite, one of the licensed brokers of the Stock Exchange, London, to sell the shares.

On the 18th of October, 1845, the defendant, Mr. Thomas Price, of the Stock Exchange, London, contracted through Mr. Graves, of the Stock Exchange, as the agent, to buy the 100 shares for 2*l.* 17*s.* 6*d.* per share.

The contract was made between Mr. Satterthwaite as the broker of the plaintiff, and Mr. Graves as the broker or agent of the defendant.

The bill stated, that, according to the practice of the Stock Exchange, the name of the principal, who was the purchaser of the shares, was not required to be disclosed by Mr. Graves until the 30th of October, 1845; and that, according to this practice, a note or ticket was, on the 30th of October, 1845, sent by Mr. Graves to the office of Mr. Satterthwaite; by which Mr. Satterthwaite was required to transfer, or cause to be transferred, 100 Newry and Enniskillen Railway shares into the name of Thomas Price, of the Stock Exchange.

On the 18th of January, 1846, the plaintiff executed a deed of transfer in the following form:—

“I, Edward Bristow Philip Wynne, of &c., in consideration of a sum of 287*l.* 10*s.* paid to me by Thomas Price, of &c., do hereby transfer to the said Thomas Price 100 shares, numbered respectively 17,761 to 17,860, in the undertaking

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called the Newry and Enniskillen Railway Company, standing in my name in the books of the Company, to hold unto the said Thomas Price, his executors, administrators, and assigns, subject to the several conditions on which I hold the same at the time of the execution hereof; and I, the said Thomas Price, do hereby agree to take the said shares, subject to the same conditions."

At the time of the execution of this document, the plaintiff had not received the certificates of shares from the Company, and on that account it was sent to the office of the Company; and the secretary indorsed upon it a memorandum, stating that the certificates of the shares were in the office, and that they would be delivered to the defendant as soon as they were issued.

The deed was then delivered back by the secretary to Mr. Satterthwaite, who, on the same 18th of January, sent it to the office of the defendant, who received it, and gave to Mr. Satterthwaite a cheque for the purchase-money.

The defendant having neglected to register his name as a proprietor, according to the provisions of the Companies Clauses Consolidation Act, 1845, the plaintiff received a letter from the solicitors of the Company, dated the 25th of September, 1847, demanding payment of 450*L*. for two calls on the shares, which was the first notice received by him of the omission on the part of the defendant to execute the transfer and leave it with the secretary, in order that a memorial of it might be entered in the register of transfers.

Under these circumstances, the bill prayed that the defendant might be ordered to procure the 100 shares to be duly and effectually transferred into and registered in his name in the register book of shareholders; and that he might be ordered to execute, if he had not already executed, the deed of transfer, and to deliver the same, so duly executed, to the secretary of the Company, in order that a memorial might be entered in the book called "The Register of Transfers;" and that he might be ordered to take all

such proper steps for effectually transferring and registering the shares; and that he might be ordered to pay all calls already made, with interest, and indemnify the plaintiff against all losses and costs already incurred, or to be incurred, by reason of the defendant not having procured the shares to be registered, and by reason of the non-payment of the calls.

The defendant stated, by his answer, that he bought the shares from Mr. Graves, who was a jobber on the Stock Exchange, on behalf of a Mr. Worgan; and that, on Worgan desiring time to pay, the defendant obtained an extension of the time for completion from Graves, who required a name of a principal; that the defendant thereupon told Graves, that, although the shares were not for himself, yet the transfer might be made out in his own name, and he would pay the purchase-money on behalf of his principal; that no principal's names were disclosed, either by the defendant or by the plaintiff, or by Satterthwaite, nor was it even binding upon the members of the Stock Exchange to state the names of principals, nor did the giving of a name by a buyer to a seller of shares imply that such name was that of the buyer and principal in the transaction; that sales of shares were sometimes effected in the Stock Exchange under an express understanding or agreement that the buyer should give a guarantie for registering the shares sold; but that, when such guarantie was given, the shares were sold at a lower price; that it was not a part of the bargain, in the present case, that the purchaser should register; that Worgan was the proper person to register the shares, but that he never agreed to purchase any specific shares.

On behalf of the plaintiff, witnesses deposed that it was a practice among brokers in London, on selling railway shares, to stipulate that the buyer should register them in his own name, where there were grounds for apprehending that he would not do so; and that it had been for some time a frequent practice to make such a stipulation upon

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sales of shares at a discount on which future calls might be made.

The Secretary of the Stock Exchange was examined as a witness, and deposed as follows:—"I do know, and it is a fact, that, in many instances, railway shares have been sold on the Stock Exchange, the purchaser of such shares giving or undertaking to give a guarantee of registration; but I cannot, at this moment, recollect any such particular instances or instance. In such cases or instances it is now, and has been for the last two years or perhaps longer, but I cannot say whether or no from 1845, the custom on the Stock Exchange, as regards brokers dealing with each other or with jobbers, to sell railway shares so guaranteed to be registered by the purchaser in his own name, at a value below or under the market price, sometimes to the extent of from 5*s.* to 20*s.* per share."

Mr. Worgan, who was examined on the part of the defendant, deposed, that he had authorised the defendant to purchase the shares for him.

Mr. *Lloyd* and Mr. *Vance* for the plaintiff.—It follows from the nature of the contract, that the vendor is to be guaranteed from all liability in respect of the shares after the sale, as was decided in *Shaw v. Fisher* (a), which is a conclusive authority in the present case.

Mr. *Russell* and Mr. *A. J. Lewis* for the defendant.—The evidence shews that, according to the usage of the Stock Exchange, a purchaser is not bound to register unless it is stipulated that he shall do so, in which case he pays accordingly. If the defendant did not register, the defendant might have received the dividends. The conduct of the plaintiff shews that he did not consider the defendant bound to register; for he would, on receiving

(a) 2 De G. & S. 11.

the notice to pay the calls, have gone to the broker, and complained that the defendant had not registered. The contract was entered into, as is always the case, with a jobber. It is a matter of arrangement between the jobber and the broker whether the purchaser is to register. It is the jobber against whom the complaint (if any) must be made. The defendant was no party to any contract with the plaintiff, who has, therefore, no title to enforce specific performance against him. The defendant only agreed to buy from Graves, and if the plaintiff adopts Graves as his agent, he is affected by the notice which Graves had, that the defendant was purchasing only as an agent for Worgan, and not on his own account.

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The VICE-CHANCELLOR:—

The facts of this case effectually preclude the defendant from denying privity between him and the plaintiff. The defence is without apology or excuse. The defendant must pay the calls that have been made since the sale. He must indemnify the plaintiff against all future calls in respect of the shares, and must take proper measures to procure himself to be registered. The manner of expressing this decree may require consideration. As to its substance there is no difficulty. There must be a reference to the Master, if necessary, to inquire what calls have been made, when they were made, and what is due in respect of them. The defendant must execute the transfer deed, and deliver it to the Secretary, in conformity with the Act of Parliament; and the plaintiff must authorise the trustees of the Company to deliver the certificates to the defendant; who must pay the costs of the suit.

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Feb. 9th.

1851.

April 25th.

MORTIMER v. HARTLEY.

JOHN WESTERMAN, the father, on the 23rd of February, 1826, in the manner then required for passing real estates by devise, made his will, of which the material clauses were as follows:—

“I, John Westerman, of Gildersome-street, in the parish of Batley, cotton manufacturer, do make this my last will and testament, whereof I appoint my wife, Mary Westerman, Joseph Johnson, Joseph Hartley, and Samuel Atkinson, executors and trustees, with every power that I can give, to act upon the trusts of this my will, which is as follows:

1st. “I order all my just debts, funeral expenses, and the charges incident to the probate and execution of this my will, to be paid with as little delay as possible out of my personal estate.”

The 2nd, 3rd, and 4th clauses contained specific and pecuniary legacies.

The 5th clause authorised the testator's wife to occupy his dwelling-house, with the furniture, until 1828.

By the 6th clause, the testator directed his farming-stock to be sold, and his debts and stock in trade to be collected with as little delay as possible.

A testator, W., devised his real estates to trustees, upon trust to receive the rents, and, on his son John arriving at the age of twenty-five years, to let him into possession, but neither he nor his heirs to the third generation were to sell or mortgage the same, it being the testator's desire that the property should remain in the W. name. If John should die without leaving lawful issue, it was the testator's will that his daughter Ann should have his share, subject to the same limitations. If John and Ann should die under age, or without leaving issue, the testator devised the property, after deducting a certain sum from the produce in favour of his (the testator's) daughter Elizabeth, to and for the benefit of the plaintiff. The testator had the three children named in his will living at his death, and no more. Elizabeth died at the age of two years; Ann survived her, and died at the age of nineteen years, unmarried; and John, the last survivor, died, aged thirty years, leaving children, who all died unmarried, and without issue. John, by his will, devised part of the father's real estate to the defendants:—*Held*, first, that the devisees of John, the son, took no estate in the hereditaments of W. the father, devised by his will; and, secondly, that the plaintiffs took the estates in the hereditaments of W. the father, and in such manner as given to them by the will of W. the father.

Where there is a doubtful question as to the legal title to an estate on the construction of a will, the practice is, not to determine it on demurrer, although the inclination of the Court may be in favour of the defendant, but to overrule the demurrer, without prejudice to the defendant's insisting on the same matters by way of answer. *Brownson v. Edwards* referred to on this point.

Ann v. Ann 17 Beau. 212.

7th. "It is my will, that my trustees let, for a fair and reasonable rent, the close called Street-close, the stable, the barn and mistal, and the workshops, together or in lots, as to them shall seem best, until my son John arrive at the age of twenty-five years."

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8th. "I have much tillage, &c., in the stone pits; and if my lord's agents will consent, I desire my trustees to let them for a fair rent, with valuation on and off, according to the improved state they are in, until John arrive at the age of twenty-five years; but if my lord's agents do not consent freely, then my trustees must farm them to the best advantage until John come to twenty-five years of age."

9th. "I hereby will and direct that my trustees regularly collect the rents of my cottages, together with the rents which they may have let my other property for, so that the monies to be received on account of trade and they may become one, and, after all my debts are paid, may accumulate until John attains the age of twenty-five years."

10th. "When John arrives at the age of twenty-two years, I will and direct, that my trustees take 600*l.* and secure it, either upon mortgage of freehold estate or Government stock, and pay the interest, as and when it is received, to my daughter Ann, who will then be twenty-five years of age, during her natural life; and, if she be married and have children, to her husband during his life; should he survive her, then the principal to be divided equally amongst their children, and if any shall have died leaving lawful issue, such child or children to have the parent's share; but should Ann die without lawful issue, I will that the said 600*l.* be immediately divided, one-half to Elizabeth and the other to John, or their heirs. I must here remark, that whatever my personal property, with its accumulations, falls short of 600*l.*, the real estate must be mortgaged, or the coal sold, to make up the deficiency, as the trustees may deem best."

11th. "I will that my son John, having attained to twenty-

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five years of age, be let into possession of all my property, real and personal, which remains, on this express and unalterable condition, that neither he nor his heirs, to the third generation, shall have power to sell or mortgage any part of the freehold estate now in my own occupation, or in the occupation of Squire Ellis and Francis Smith, otherwise than my executors may have been forced to do before giving him possession; but mark, if the trustees do not sell the coal, but mortgage the estate, I empower John, or his heirs, to sell it to pay off the mortgage, but not otherwise; and, in like manner, I debar him and his heirs from selling or transferring those cottages, with cart-house and appurtenances, built on the waste, now in the occupation of James Halliday, Joseph Hobson, Robert Metcalf, Hannah Marshal, John Wade and myself, it being my desire that they should be kept in the Westerman name."

12th. "If it should happen that my son John die without leaving lawful issue, it is my will that my daughter Ann have his share, subject to the same restrictions, limitations, and exceptions under which he has it."

13th. "Now, if it should please God to take away both Ann and John under age, or without leaving lawful issue, I give and bequeath unto my brother Joseph Westerman and his heirs for ever, all those cottages and cart house built on the waste occupied by Robert Metcalf and others, with their appurtenances."

14th. "I order all that is left to be immediately sold, and out of the money arising from such sale, I will and direct that my trustees pay to my daughter Elizabeth, or her legal representative, the sum of 500*l*.; and the residue, be it more or less, divided equally amongst the children of Elizabeth Mortimer, of Churwell, my aunt, my mother's children by Mark Sowden, including Joseph Westerman and the children of my late aunt, Susanna Stephenson, share and share alike." •

By the 15th clause, the testator directed that his trustees should not be answerable for involuntary loss.

16th. "Revoking all other wills by me at any time heretofore made, I declare this to be my last will and testament, this 23rd day of February, 1826."

The testator, John Westerman, the father, was illegitimate. He died on the 27th of April, 1826, having had three children only, viz.—Ann Westerman, John Westerman, and Elizabeth Westerman.

The daughter, Elizabeth Westerman, died on the 6th of March, 1826, in her father's lifetime, an infant.

The other daughter, Ann Westerman, survived her father, and died on the 26th of May, 1829, an infant, and without having been married, leaving her brother, John Westerman, the son, her heir at law.

John Westerman, the only remaining child of the testator, and his heir at law, attained his age of twenty-two in 1835, and, thereupon, was let into possession of all the estates devised to him by his father's will, and continued in possession until his death.

John Westerman, the son, attained his age of twenty-five years some time in the year 1838, and died on the 11th of April, 1842, having had three children only, namely, John Walter Westerman, who died an infant, in his father's lifetime, John Denton Westerman, who died an infant on the 1st of December, 1844, and Lydia Elizabeth Westerman, who died an infant on the 19th of April, 1846. All the children of John Westerman the son died without issue.

John Westerman the son did not in his lifetime bar his estate tail, if such were the estate he took under his father's will in the real estates thereby devised, or the remainders or reversions thereupon expectant or depending; but by his will, dated the 31st day of March, 1842, which was duly executed and attested, he devised all his real estates unto and to the use of the defendants, James Hartley and Edward Denton, their heirs and assigns, upon trust for sale. They were also appointed executors of his will, which they proved.

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This suit was instituted by the children of Elizabeth Mortimer the aunt of the testator John Westerman the father, Joseph Westerman, mentioned in his will, and the other children of the same testator's mother Sarah Sowden, and the children of Susannah Stephenson the aunt of the same testator, also mentioned in his will, against the surviving devisees and trustees under the will of John Westerman the father, the devisees under the will of John Westerman the son, and Her Majesty's Attorney-General.

The plaintiffs by the bill insisted, that, under the limitations of the will of John Westerman the father, his estates, upon the death of his son without issue, vested in them; and the prayer was, to have the trusts of the will of John Westerman the father, in respect of the real estates thereby devised, performed and carried into execution; and that the rights of the parties claiming under that will might be declared.

Mr. Malins and Mr. J. T. Humphry, for the plaintiffs.—The testator's will created an estate tail in John Westerman the son, with a remainder in tail to the daughter Ann. These estates tail were never barred, and they determined on the death of the survivor of the three children without issue. The plaintiff Joseph Westerman, therefore, now claims the cottages given to him by the 13th clause of the will, and the other plaintiffs claim under the 14th clause, which directs "all that is left to be immediately sold" for their benefit.

The word "or" in clause 13th, "now, if it should please God to take away both Ann and John under age, or without leaving lawful issue," must be read as "or" and not as "and;" and the word "immediately" in the 14th clause, must be read as applicable to either of the two events mentioned in the 13th clause. As soon as the son attained twenty-five, the compound event of his dying under age and without leaving lawful issue, (which the limitation, as it

would be changed if "or" were read as "and," would contemplate,) could not happen. To convert the word "or" into "and," would be unnecessarily to alter a sentence in a will which is intelligible, in order to make it much less intelligible.

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The testator intended his daughter ANN to take an estate tail as his son John was to take, for he says in the 12th clause, that she was to take "subject to the same restrictions, limitations, and exceptions."

It may be conceded, that, under the 11th clause, the devise was a fee simple in John; but the 12th clause reduces it to an estate tail. This case comes within the principle not of *Pells v. Brown* (a), or of *Forth v. Chapman* (b), but of *Doe d. Ellis v. Ellis* (c). The freehold in remainder expectant on the determination of the two successive estates tail is undisposed of until the 13th clause, and by the 13th and 14th clauses it is to go over on either one of two events, the son and daughter dying under age, or without leaving lawful issue. *Boraston's case* (d), *Doe d. Roake v. Norrell* (e), and *Arcs v. Phipps* (f) in the House of Lords, where all the cases on this point were reviewed. These cases, and *Bull v. Prichard* (g), are in favour of the plaintiffs.

Brownsword v. Edwards (h) sustains the construction according to which the devise over in this will, in favour of the plaintiffs, took effect.

The VICE-CHANCELLOR, after referring to *Brownsword v. Edwards*, remarked, that, in that case, Lord *Hardwicke* had said: "As this is a question upon the legal title to an estate, on the construction of a will, if there was any doubt I should not determine it on demurrer, but would, notwithstanding the inclination of my opinion might be in favour of the de-

(a) Cro. Jac. 590.

(b) 1 P. Wms. 663.

(c) 9 East, 382.

(d) 3 Rep. 19 a.

(e) 1 M. & Selw. 327; S.C., in

Dom. Proc., 5 Dow, 202.

(f) 9 Bligh, N. S., 468.

(g) 1 Russ. 213.

(h) 2 Ves. sen. 243.

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pendant, overrule the demurrer, without prejudice to defendant's insisting on the same matters by way of answer." He had acted on this, but understood that it had been said, that he had not, in so acting, followed the course of practice of the Court. It was satisfactory to him to know, that the authority for the practice he had followed was that of Lord *Hardwicke*.

The VICE-CHANCELLOR:—

May 4th.

The plaintiffs claim under the two clauses, numbered 13 and 14, in the will of the testator in the cause, or the latter of those two clauses; and, unless under one or both of them, have certainly no title to sue: so that the only question argued before me has been upon the construction of those parts of the will, considered, as of course they must be considered, with a due degree of attention to every other part of the instrument.

So far as it is material to refer to the state of circumstances under which the contention, relating as it does to real estate only, has arisen, the facts admitted are, that the testator had three children, those, namely, mentioned in the will, and no other child; that, of the three, Elizabeth died in the testator's lifetime an infant, without having married, and Ann survived him, and died an infant also, without having married; that she was survived by her brother John; that John died in the 29th or 30th year of his age, leaving two or three children, who since have died; and that the issue of John has totally failed.

The plaintiffs have conceded, and I think correctly, that the two clauses are to be read together—are to be construed together—in this sense, that as the gift to the plaintiff, Joseph Westerman, contained in the 13th clause, was not an immediate gift—was not a gift in possession, so neither was the gift or provision under which all the plaintiffs claim, that contained in the 14th clause; and that if the gift to Joseph Westerman was contingent or conditional, so, to the same

extent and in the same manner, was the gift or provision under which all the plaintiffs claim contingent or conditional. Upon the words, "Now, if it should please God to take away both Ann and John under age, or without leaving lawful issue," the testator intended the gift or provision under which all the plaintiffs claim, to depend as much, and in the same manner, as he intended his gift to Joseph Westerman to depend on them. What then did the testator mean by these words, and what is their effect? for that is the question—a question not capable of being properly considered, without inquiring what interests John and Ann, or at least what interest John, took under the will in the real estate. For, if John, under the will, (whether legally or equitably) took for life only, or took a fee simple, absolute or base—a fee simple, defeasible or not defeasible, by or under an executory devise or a conditional limitation, the suit fails, since John did not die under age—since he did leave issue living at his death, and since upon the hypothesis of John not taking in tail, a provision to take effect upon the failure of the respective issue of him and Ann at an indefinite period, must, I suppose, be treated as void. Accordingly, the plaintiffs' counsel have contended, that, under the will, John was, at the time of his death, legally or equitably, tenant in tail; and that Ann having, in John's lifetime, died a minor, without having been married, the gift or provision in favour of Joseph Westerman, in the 13th clause, and the gift or provision under which the plaintiffs claim in the 14th clause, were gifts or provisions by way of remainder immediately expectant on the determination of that estate tail, by the failure (whensoever happening) of the issue of John; and perhaps, if the words "under age or" had not formed part of the passage already quoted, but had been omitted, the proposition would be clearly true. But the three words being where they are, is the proposition true? To this the answer may possibly be affected materially by the consider-

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ation of the state of the title, as it would have been if John, having survived (as he did survive) the testator, had died (as he did not die) a minor. In such a condition of circumstances, I think that Ann, whether attaining or not attaining twenty-five, whether surviving or not surviving John, could not, under the 12th clause or otherwise, have claimed against the issue of John; and that, upon authority at least, if not upon principle and reason as well as authority, the plaintiffs' title could not, before or after Ann's death, have been asserted to the exclusion of the issue of John, or in preference to that issue. In speaking of authority, I refer particularly to *Sowell v. Garrett*(a), *Fairfield v. Morgan*(b), *Denn v. Kenneys*(c), *Right v. Day*(d), and other cases of a like kind.

Still, however, ought the will to be construed as exhibiting an intention, effectual at law or in equity, that, upon the total failure of the issue of John, whensoever happening, or upon the total failure of Ann's issue and also of the issue of John, whensoever happening, the gift or provision under which the plaintiffs claim should take effect in possession? Upon that point, or any other that the defendants' counsel may think material, I wish to hear them. All that I have said (so far as it goes) being in their favour.

Mr. Russell and Mr. Elmsley, for the defendants.—The word “or” in the 13th clause must be read as “and.” The testator could not be presumed to have contemplated the disinheriting of the issue of his children John and Ann if they died under age, and this must be held to have been the testator's intention if the Court adheres to the construction of “or” as a disjunctive particle. This consideration is sufficient to induce the Court to read the 13th clause as if “and” were put in the place of “or.” [They

(a) Moore, 422, pl. 590; S.C.,
 nom. *Soulle v. Gerrard*, Cro.
 Eliz. 525.

(b) 2 N. R. 38.
 (c) 9 East, 366.
 (d) 16 East, 67.

cited *Glover v. Monckton* (a), and *Keily v. Fowler* (b). They also cited *Luxford v. Cheeke* (c), and *Jones v. Westcomb* (d), and distinguished *Brownsword v. Edwards* (e) from the present case (f).]

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Mr. *Wray* for the Attorney-General.

The VICE-CHANCELLOR:—

I doubt much whether, without varying in some degree the language of the will, such a case could be sent to a Court of law as it would give an opinion upon. I cannot dismiss the bill without having the benefit of such an opinion. It will require a careful hand to alter this will enough and not too much.

A case was accordingly settled, stating the will, with slight alterations so as to make the limitations clearly legal, and the facts of the case, with three questions for the opinion of the Court of Common Pleas, as follows:—

First, Whether the devisees of John Westerman the son had any and what estate in the hereditaments, devised or affected by the said will of John Westerman the father, or any and which of them.

Second, Whether, in the events that had happened, Joseph Westerman had any and what estate under the 13th clause of the said will of the said John Westerman the father, in the cottages and cart-house built on the waste, occupied by Robert Metcalf and others, with their appurtenances.

Third, Whether, in the events which had happened, any

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| (a) 3 Bing. 13. | last edition of Fearn's Contingent |
| (b) 3 Bro. P. C. 299. | Remainders, and read an extract |
| (c) 3 Lev. 125. | from the Original View of Execu- |
| (d) Pre. in Chanc. 316. | tory Interests, by the editor, Mr. |
| (e) 2 Ves. sen. 243. | Josiah W. Smith (Fea. Con. Rem. |
| (f) His Honour referred, in | vol. 2, p. 356), as bearing on the |
| terms of commendation, to the | present case. |

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and what person or persons other than Joseph Westerman and the devisees of the said John Westerman the son, had or had had any and what power of selling or appointing any and what estate in any and what part of the hereditaments devised or affected by the said will of the said John Westerman the father.

The case was argued before the Court of Common Pleas, in Trinity Term, 1848, by Mr. *Malins* and Mr. *J. T. Humphry*, for the plaintiffs, and by Mr. *Elmsley*, for the defendants^(a).

The Judges returned the following certificate of their opinion:—

1st. "That the devisees of John Westerman the son have an estate in fee simple in all the hereditaments devised or affected by the will of John Westerman the father.

2ndly. "That, in the events that have happened, Joseph Westerman has not any estate under the 13th clause of the said will of the said John Westerman the father in the freehold cottages and cart house built on the waste, occupied by Robert Metcalf and others, with the appurtenances.

3rdly. "That, in the events which have happened, no person or persons, other than the devisees of John Westerman the son, has or have any power of selling or appointing, or any estate in, the hereditaments devised or affected by the said will of the said John Westerman the father.

"THOMAS WILDE,

"T. COLTMAN,

"C. CRESSWELL,

"December 6, 1848."

"E. V. WILLIAMS."

^(a) This case is reported fully in 6 C. B. 819—846. The will, as altered to avoid all question as to the legal estate, is set out at length in that report.

The case now came on on further directions.

Mr. *Malins* and Mr. *J. T. Humphry* for the plaintiffs. —The opinion of the Court of Common Pleas is entirely against the decision of Lord *Hardwicke* in *Brownsword v. Edwards* (a). That has generally been cited as a case in which Lord *Hardwicke* changed the word “and” into “or” —an intention which he distinctly disclaimed in the latter portion of his judgment. His Lordship drew a distinction between cases in which the first limitation was in fee, and those in which it was in tail, holding that, in limitations of the former kind, such a change might be made, but not in the latter. Now, according to his mode of construction in that case, the limitation in the present will would read thus: “Now, if it should please God to take away both Ann and John under age *and without issue*, or *afterwards* without leaving lawful issue,” interpolating the words “and without issue” and “afterwards.” This construction would not defeat the issue in either event, and would make it a gift over on failure of issue generally, and so give the plaintiffs the remainder in fee upon the determination of the estates tail.

This view of *Brownsword v. Edwards* is adopted by Mr. *Fearne* (b), although this case is differently stated by him at p. 506, and by some other text writers.

Thus Lord *Hardwicke's* judgment is a distinct authority for the plaintiffs, and, it is submitted, will induce the Court to send the case for the opinion of another Court of law.

Mr. *Russell* and Mr. *Elmsley*, for the defendants, asked the Court to decide the case upon the opinion already taken. They cited *Denn d. Wilkins v. Keney* (c), and *Eastman v. Baker* (d).

(a) 2 Ves. sen. 243.

(b) Cont. Rem. 526.

(c) 9 East, 366.

(d) 1 Taunt. 174.

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The VICE-CHANCELLOR, after observing on *Eastman v. Baker and Fairfield v. Morgan* (a), said, that, as this was a case of difficulty and doubt, it was proper to accede to the plaintiffs' request.

A case similar to that which had been sent to the Court of Common Pleas, with the same questions thereon, was directed to the Court of Exchequer.

The case was argued in Hilary Term, 1850, and stood over until Hilary Term, 1851.

The Barons of the Exchequer gave their certificate in this case as follows (b):—

“ We have heard this case argued by counsel, and have considered it, and are of opinion,

1st. “ That the devisees of John Westerman the son have no estate in the hereditaments devised or affected by the said will of John Westerman the father.

2nd. “ That, in the events which have happened, Joseph Westerman has an estate in fee in remainder in the tenements comprised in the 13th clause.

3rd. “ That, in the events that have happened, the trustees have the power of sale of the other tenements not comprised in the 13th clause.

“ FREDK. POLLOCK,

“ J. PARKE,

“ E. H. ALDERSON,

“ T. J. PLATT.”

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The case now came on again upon further directions.

(a) 2 N. R. 38.

(b) The Reporters have been furnished with a copy of the shorthand writer's note of observations made by Mr. Baron Parke in delivering the judgment of the Court, on the 11th of January, 1851.

The learned Baron, after stating the will and circumstances of the case, proceeded thus:—

“ The first point to be determined is, what estate John Westerman the son took under the 11th, 12th, and 13th sections of

Mr. *Malins* and Mr. *J. T. Humphry* appeared for the plaintiffs.

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the will. Now, from the 11th section, it is clear the testator intended his son John should take more than an estate for life, for he prohibits his heirs from selling; and he must mean his heirs, therefore, should have, before they could sell.

"The only question on this part of the case is, what estate the testator intends? We think, as he prohibits John's heirs, to the third generation, from selling or mortgaging any part of the estate in the possession of the testator, Ellis, and Smith, he meant that his son and the third generation of his heirs should succeed to his real estate; and this expression is equivalent to that of 'heirs lawfully begotten,' which, according to *Nanfan v. Legh* (7 Taunt. 85) creates an estate tail. The testator, in like manner, debars John and his heirs from selling the cottages with the cart-house built on the waste, in the possession of Haldiday, Hobson, and others, it being his desire that they should be kept in the Westerman's name. We think the testator meant, by using the words 'in like manner,' that the same class of heirs, that is, heirs of the third generation, are to enjoy the cart-house, &c., as before mentioned; and to carry into effect this desire, the cottages are to be kept in the Westerman's name. If those words stood alone, uninfluenced by the context, the estate tail in that property would be an estate in tail male; but the subsequent provision may

qualify the meaning of this expression.

"The next clause provides, that if John dies without leaving lawful issue, the estate left to John shall go to Ann, subject to the same limitation, and shews the intent that Ann should have a similar estate also; but the devise, that the estate should be kept in Westerman's name, cannot be accomplished in her case by giving her an estate in tail male; and if John were held to have an estate in tail male, the consequence would follow, that John's daughter would be passed over in favour of John's sister, and this is inconsistent with the words, that one should have the estate in like manner as the other. These words naturally mean, the same estate in general being given to both, and the word male, in order to put both upon the same footing, as clearly intended, is to be construed to mean family, or right line. But whether John takes an estate in tail male, or an estate tail general, in the events which have happened, is not material to be considered. We think he took an estate tail of some kind.

"The next clause creates the great difficulty in the case: 'Now, if it should please God to take away both Ann and John under age,' that is, under twenty-five, 'or without leaving lawful issue, I give and bequeath to my brother Joseph Westerman, and his heirs, for ever, all those cottages and cart-house, built on the waste, oc-

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Mr. Russell and Mr. Elmsley for the defendants.—The opinions of the Judges of the Court of Common Pleas and

occupied by Robert Metcalf and others, with their appurtenances.' Is the word 'or' to be understood according to its grammatical meaning, or as the copulative 'and'? If the former, then these particular lands would go to Joseph Westerman in fee; if the latter, then his remainder would be defeated.

"If the estate had been given to John and his heirs, &c., there are many cases which shew that 'or' would be read as 'and,' so as to save the estate to the issue of John and Ann if they married and died before twenty-five. But here the first gift is of the estate tail, according to our view of it, and not a fee. And it is contended for the plaintiffs, upon the authority of Lord *Hardwicke*, in the case of *Brownsword v. Edwards* (2 Ves. sen. 243), that that circumstance makes a material difference, and that the word 'or' ought to be read in its ordinary sense. Objections have been taken to the opinion of Lord *Hardwicke*, and it has been said, that he went so far in that case as to hold that *and* ought to be changed into *or*, for the purpose of obtaining a result the absolute opposite to that for which the converse alterations had been made in the cases before referred to. That is stated in a learned and excellent book (1 Jarm. on Wills, 447), and is also mentioned by Fearn (Fearn on Con. Rem. 506), and by Lord *Brougham* in giving judgment in

the case of *Malcolm v. Taylor* (2 Ruff. & My. 4-K. 447).

"In *Brownsword v. Edwards*, the estate was devised to trustees until John Brownsword should attain twenty-one, and if he should live to attain twenty-one, or have issue, then to John Brownsword or the heirs of his body; but if he should happen to die before twenty-one, and without issue, then over. Lord *Hardwicke* says, there is no necessity to alter or to supply words, for there was a plain natural construction upon the words, 'if the said John should happen to die before twenty-one, and also should happen to die without issue.' That is the way he construes them, which makes the dying without issue to go through the whole, and answer the intent of the testator. It appears, therefore, to have been a mistake to attribute that alteration in the words of the will to Lord *Hardwicke*. What is said by his Lordship seems to be perfectly correct.

"With respect to the other part of Lord *Hardwicke*'s judgment, we consider it as an authority upon which we ought to act. The disposition of Courts should always be to abide by the words of a will and read them in their ordinary grammatical sense. If we do so in this case and make no alteration whatever, it is possible we may disappoint what we may conjecture to have been one intention of the testator, (because it is a reasonable intention to enter-

Execd. by B. Russell
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of the Exchequer being at variance, the defendants are entitled to ask that the opinion of the Court of Queen's Bench

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tain,) that is, to give a benefit to the issue, if their parents should die under twenty-five; but we are sure of carrying into effect a manifest and declared intention of the testator, to give the remainder over to Joseph on the determination of the estate tail. On the other hand, if we change *or* into *and*, and for the purpose of effecting the conjectured intention to give a benefit to the issue on the death of their parents respectively under twenty-five, we defeat the clear and manifest intention to give a remainder to Joseph on failure of the issue of John and Ann, and cause an intestacy as to that remainder, a circumstance that ought always to be avoided.

"We think, therefore, that we are more likely to carry into effect the intention of the testator by not departing from the words of the will and that sound rule of construction.

"If the first limitation had been to John and his heirs, and if he should die under twenty-five, or without issue, then to Joseph, we should have felt ourselves bound by the numerous authorities on that subject, to hold that the disjunctive *or* must be construed as the conjunctive *and*. But as none of the authorities apply to an estate tail, and we have Lord Hardwicke's high authority for distinguishing such a case, we are of opinion we ought to do so, and abide by the ordinary sense of the words. And if

in this case any change in the language should be made, the one which would be most likely to effect the presumed and declared intention of the testator would be to read the words as if they had been—'And if it shall please God to take away both John and Ann under age, or at any time, without issue.' By so reading it, the issue would take if their parents had died under twenty-five, and Joseph succeed on the determination of the estate tail. But if this cannot be done, we think we should make no change at all, and by so doing we are much more likely to construe the will according to the testator's intent than by altering '*or*' into '*and*.'

"The next question is, what becomes of the remainder upon the estate tail which did not pass to Joseph under the 13th clause? The direction, that all that is left shall be immediately sold, would include the remainder. All that is left comprises the residue, and the direction to sell, does not exclude the supposition, that it was meant to comprise in it the reversion of the estate tail.

"The case of *Roe d. James v. Avis*, (4 T. R. 605), in which that circumstance was considered as a ground for excepting the reversion, must be considered as overruled in *Church v. Mundy*, 15 Ves. 403, and in *Mostyn v. Champneys*, 1 Scott, 293, 1 Bing. N. C. 341.

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should be taken, especially as the authorities are conflicting, there being *Fairfield v. Morgan* (a) on one side, and *Brownsword v. Edwards* (b) on the other.

[They also referred to *Glover v. Monckton* (c), *Doe d. Smith v. Webber* (d), *Price v. Hunt* (e).]

The *Vice-Chancellor* referred to *Jones v. Westcombe* (f), and *Murray v. Jones* (g).

Mr. *W. M. James* appeared for the Attorney-General.

The VICE-CHANCELLOR:—

I am of opinion, that John was tenant in tail in this sense—that he was either tenant in tail general or tenant in tail male, with remainder to himself in tail general. It is immaterial which of these two constructions is the right one, because in neither event could his estate be exhausted as long as there was any issue of him existing.

I think that the estate limited to Ann was limited in a similar manner.

And on the authority of *Brownsword v. Edwards*, and *Murray v. Jones*, and other cases, I am of opinion, that the testator in the 13th and 14th clauses of the will has but inaccurately expressed that he disposed of everything after the failure of the limitations contained in the prior clauses, in whatever manner they might fail. As they failed, I think that the limitations over, comprised in the 13th and 14th clauses, took effect.

Agreeing in substance with the Court of Exchequer, I decline to send a case for the opinion of another Court of law.

(a) 2 N. R. 38.

(b) 2 Ves. sen. 243.

(c) 3 Bing. 13.

(d) 1 B. & Ald. 518.

(e) Pollexfen, 645.

(f) Pre. in Ch. 316.

(g) 2 V. & B. 313.

1849.

CLARK v. COOK.

Feb. 10th.

THIS was a suit for the redemption of a mortgage.

By the mortgage deed, dated the 23rd of May, 1835, acknowledged under the Act for abolishing fines and recoveries, James Burden and Ann his wife, in consideration of 120*l*. due to the defendant from James Burden, demised freehold estates (to which the husband and wife were entitled in right of the wife, during the life of the latter), to the defendant William Cook, for ninety-nine years, if the wife should so long live, upon trust, from time to time, to receive the rents, issues, and profits of the property, and by, with, and out of the same, or any part thereof, pay and discharge the annual or other premiums which should, for the time being, become payable for keeping the messuages or tenements and other buildings thereby demised, insured from loss or damage by fire, pursuant to the covenant on the part of the said James Burden thereafter contained; and also in respect of a certain policy of insurance therein after covenanted by James Burden to be effected on the life of Mrs. Burden; and then upon trust, that the defendant, his executors, administrators, and assigns, should, by, with, and out of the same rents, issues, and profits, in the first place, retain and satisfy unto and for himself and themselves, interest on the above-mentioned sum of 120*l*.; and, in the next place, should apply the residue in or towards payment and discharge of so much of the principal sum of 120*l*., as the same would from time to time extend to pay, until the whole sum of 120*l*. and interest should be thereby or otherwise fully paid and discharged; but such appropriation of the rents was not to be obligatory on the defendant, his executors, adminis-

A husband and wife, by deed acknowledged demised freeholds of the wife to a mortgagee by way of trust, the trusts being to apply the rents and profits in payment of certain premiums on insurance, and of the interest on the mortgage debt, and then in reduction of the principal, until it should be paid off. The husband took the benefit of the Insolvent Act: —*Held*, in a suit for redemption instituted by the assignee in insolvency against the mortgagee, that the latter was chargeable with the surplus rents which he permitted to be received by the insolvent's wife for her maintenance, the principles established by *Sturgis v. Champneys* not extending to such a case. But there being ground for supposing

that the Court would have made such a provision for the wife, the Court, although the balance was found against the mortgagee, decreed payment without costs.

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trators, and assigns. The deed also contained a power of sale, and a declaration that the defendant, his executors, administrators, and assigns, should stand possessed of the proceeds of the sale upon trust, after deducting their costs, charges, and expenses, to retain the sum of 120*l.* and interest, and, after payment and satisfaction thereof, to pay the surplus (if any) of the said trust monies unto Mr. Burden, if then living; but if dead, then unto Mrs. Burden, or her executors or administrators. And there was a clause providing for the cesser of the term on satisfaction of the sums secured by the deed.

No insurance was effected on the wife's life, as contemplated by the mortgage.

On the 7th of August, 1840, the husband presented his petition to the Court for the Relief of Insolvent Debtors to be discharged; and on the 20th of August, the usual vesting order was made by that Court. On the 9th of December, 1840, the defendant was appointed assignee of the insolvent's effects.

The defendant had, on and after the 6th of April, 1841, received from some of the tenants of the demised property the rents payable by them. Other parts of the rents were paid by the tenants to the insolvent's wife, but, as the defendant stated by his answer, without having received any order, permission, or direction from him so to do.

Mrs. Burden died on the 31st of August, 1846, and her husband on the 17th of February, 1847.

At the original hearing, the usual accounts were directed to be taken, including an account of what the defendant might have received, but for his wilful neglect and default, in respect of the rents of the mortgaged premises.

By the defendant's state of facts and discharge, taken into the Master's office under the decree, it was stated, that, after Michaelmas 1840, the insolvent and his wife entered into possession of one of the closes of land comprised in the mortgage, and applied the profits for the maintenance

of the wife; and that afterwards the close was let by Mrs. Burden, who received the rent of 16*l.* per annum, and applied it for her maintenance. As regarded one sum of money received in respect of rent of part of the mortgaged premises, the defendant admitted, that, on the tenant requiring the defendant's receipt, he gave the receipt to Mrs. Burden, and allowed her to receive the sum for her maintenance.

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The Master found that nothing was due to the defendant upon his mortgage, and that there had come to the hands of the defendant, or to the hands of some person or persons by his order and for his use, in respect of the rents and profits of the premises comprised in the mortgage, several sums of money, amounting to 120*l.* 12*s.* (being the amount actually admitted to have been received); and that several sums of money, amounting together to 181*l.* 1*s.* 6*d.*, might have come to the hands of, and been received by, the defendant, or to the hands of some person or persons by his order or for his use, or but for his wilful default, over and above and exclusively of the said sum of 120*l.* 12*s.*

These sums included the amounts which had been received by Mrs. Burden.

To this report the defendant took several exceptions.

The fourth exception was, for that the Master had not allowed to the defendant, by way of discharge, several sums of money which were applied for the maintenance of Ann Burden, out of the rents and profits of the messuages, lands, and hereditaments comprised in the mortgage of 1835, as mentioned in the defendant's state of facts and discharge laid before the Master.

Mr. Bacon and Mr. Cankrien, in support of the exception, cited *Sturgis v. Champneys* (a), *Freeman v. Fairlie* (b), and *Newenham v. Pemberton* (c).

(a) 5 My. & Cr. 97.

(b) 3 Mer. 24.

(c) 1 De G. & S. 644.

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Mr. *Russell* and Mr. *Willcock* for the plaintiff were not called upon.

The VICE-CHANCELLOR :—

I shall always be glad to follow *Sturgis v. Champneys*; but the most rigid adherence to the principles involved in that decision does not compel me to differ from the Master in the present case. I have not sufficient materials before me to enable me to say that the Court would have done for this lady what the mortgagee did; and I cannot say that the mortgagee was entitled of his own authority to make to her the allowance which he did out of the rents. He must bear the burthen of his own charity. I think that the Master was right, and I am sorry for it. The exceptions must be overruled.

The cause then came on for further directions.

Mr. *Russell* and Mr. *Willcock* for the plaintiff contended, that, as the confirmation of the report would turn the balance of the accounts in favour of the mortgagor, the mortgagee must pay the costs.

The VICE-CHANCELLOR :—

I cannot help suspecting that the wife might have had all that has been paid to her if a proper application had been made to the Court. It is a hard and peculiar case, and there must be no costs on either side.

1849.

DANIELL v. DANIELL.

Feb. 15th
& 16th.

SUSANNA ORR, by her will, dated the 17th of December, 1844, bequeathed as follows:—"To the three children of my niece, Fanny Waring, the sum of 500*l.* each."

By the decree made in a suit instituted to administer the estate of the testatrix, it was referred to the Master, among other things, to inquire and state to the Court what legacies had been bequeathed by the will.

In reference to the above bequest, the Master reported that he found, that, on the 14th of January, 1825, Frances Grace Waring, the niece of the testatrix, and in this will described as her niece Fanny Waring, then a spinster, intermarried with Henry Waring the elder; and that, at the date of the first will of the testatrix after mentioned, there had been and were then living three children, namely, Thomas Waring, Mary Louisa Waring, and Elizabeth Mary Waring.

That the testatrix, at the time of making her first will after mentioned, knew that her niece, the said Frances Grace Waring, had such three children and no more.

That in the year 1831 the testatrix made her first will, whereby, among other pecuniary legacies, she gave and bequeathed as follows:—"To the three children of my niece Fanny Waring, 500*l.* each."

That, in the month of May, 1835, there was born another child of Mrs. Frances Grace Waring, namely, Holt Waring, and that the birth of that child was communicated to the testatrix; and that the testatrix, at the time of making her second will after mentioned, knew that the said Frances Grace Waring had then four children.

That, after the date of the second will, and prior to the making of the third will by the testatrix, there were born

A testatrix in 1831 made a will, bequeathing as follows:—"To the three children of my niece F. W., the sum of 500*l.* each." At the date of this will, F. W. had three children only, as the testatrix knew. F. W. subsequently had six other children, of the birth of each of whom the testatrix was informed. The testatrix, in 1836, 1842, and 1844, made three new wills, successively revoking the former, in each of which the bequest was repeated in the same words:—*Held*, that the bequest in the will of 1844 must be read as if the word "three" had been omitted, or had been the word "nine."

Two co-defendants were examined on behalf of defendants whose interests were not identical with their own:

Held, that their testimony was admissible in evidence.

Speaks & Speaks 16 Beav. 171.
Lyons - Coventry 8 D. M. 44. 842.
See 22 Smery: 515 3 H. D. 300

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five other children of Mrs. Frances Grace Waring, namely, Francis Waring, Ann Waring, Susan Waring, Henry Waring the younger, and Selina Grace Waring; and that the testatrix was regularly informed of the birth of each child of Mrs. Frances Grace Waring; and that, at the time of making her third will as after mentioned, she knew that Mrs. Frances Grace Waring had then living nine children.

That, in or about January, 1836, the testatrix revoked her first will, and made and published a second will; and that, in the year 1841 or 1842, the testatrix revoked her second will and made a third will; and that, in each of the second and third wills, the testatrix gave and bequeathed a legacy of 500*l.* to each of the three children of her said niece Fanny Waring, in the same words as were used by her for that purpose in her first will.

That, on the 17th of December, 1844, the testatrix made her fourth and last will; and that thereby she gave certain legacies and annuities, and made the following bequest in these words—"To the three children of my niece, Fanny Waring, the sum of 500*l.* each,"—being the same words as had been used by her in her three former wills.

That all the nine children of the said Frances Grace Waring named, survived the testatrix; and that the said Susan Waring died intestate, and that her father was her administrator.

And the Master certified, that he was of opinion that the testatrix, by the bequest "to the three children of my niece, Fanny Waring, the sum of 500*l.* each," in her last will of 1844 contained, intended to give three legacies only, each of the sum of 500*l.*; and that the persons referred to by her will, by the description of "the three children of my niece Fanny Waring," were the said Thomas Waring, Mary Louisa Waring, and Elizabeth Mary Waring, the three who were born before the date of the first will.

It appeared that the knowledge, on the part of the testatrix, of the number of the children of Mrs. Waring had

been proved before the Master by witnesses, three of whom were unpaid legatees under the will of the testatrix, and two of whom were defendants in the suit.

It also appeared to have been proved before the Master, that the three wills before the will of 1844 had been destroyed; but that the Master received parol evidence of their contents given by witnesses who had read these wills.

The case now came on upon further directions, and upon exceptions to the Master's report, on behalf of the five survivors of the six younger children, and of the administrator of the sixth younger child of Mrs. Waring.

Mr. *Russell* and Mr. *C. Webster* for the exceptions.— Each of the nine children of Mrs. Waring is entitled to a legacy of 500*l.* Where a gift to children describes them as consisting of a specified number, which is less than the number of children in existence at the date of the will, the Court holds the number to have been inserted by mistake, and reads the gift as if the specified number had been omitted.

The Court decided in accordance with this rule in *Scott v. Fenhoullett* (a), *Sleech v. Thorington* (b), *Stebbing v. Walkey* (c), *Garvey v. Hibbert* (d), *Berkeley v. Palling* (e), *Lee v. Pain* (f), *Hare v. Cartridge* (g), and in *Morrison v. Martin* (h).

The Master has admitted evidence, the object of which is to shew what the intentions of the testatrix were. Not only is such evidence inadmissible: *Lord Walpole v. The Earl of Cholmondeley* (i), and *Langston v. Langston* (k); but the testimony of two of the witnesses cannot be received un-

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(a) 1 Cox, 79.

(b) 2 Ves. sen. 560.

(c) 2 Bro. C. C. 85.

(d) 19 Ves. 125.

(e) 1 Russ. 496.

(f) 4 Hare, 201.

(g) 18 Sim. 166.

(h) 5 Hare, 507.

(i) 7 T. R. 138.

(k) 8 Bligh, N. S., 167.

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der 6 & 7 Vict. c. 85, inasmuch as they are co-defendants in this suit with the defendants on whose behalf they are called, and are unpaid legatees : *Monday v. Guyer* (a).

The VICE-CHANCELLOR, after referring to *Wood v. Rowcliffe* (b), said—He thought that the interests of these two co-defendants were not identical with those of the defendants on whose behalf they were examined; and he thought their evidence admissible.

Mr. Bacon and Mr. Speed, in support of the report.—There is a latent ambiguity in this will, and parol evidence is admissible to explain that: *Hampshire v. Peirce* (c), *Miller v. Travers* (d), *The Lord Cheyney's case* (e), *Counden v. Clerke* (f), *Beaumont v. Fell* (g), *Price v. Page* (h), *Selwood v. Mildmay* (i), *Jones v. Newman* (k), *Still v. Hoste* (l), *Doe d. Le Chevalier v. Huthwaite* (m), *Doe d. Thomas v. Benyon* (n), *Doe d. Allen v. Allen* (o). [The Vice-Chancellor.—You may insist that the Court shall know all that the testatrix knew.] The facts proved by parol evidence are, that there were nine children, instead of three, at the date of the testatrix's will; and that their births were so communicated to the testatrix from time to time, as that she must have known there were more than three, and in all probability knew there were nine children, when she in her successive wills gave three legacies to three children only. This actual knowledge of the facts is peculiar to the present case, and distinguishes it from the authorities cited. In the cases cited, the Court presumed that the testator

(a) 1 De G. & S. 182.

(b) 6 Hare, 185.

(c) 2 Ves. sen. 216.

(d) 8 Bing. 247.

(e) 5 Co. 68 a.

(f) Hob. 32.

(g) 2 P. Wms. 141.

(h) 3 Ves. 306.

(i) 4 Ves. 680.

(k) 1 W. Bl. 60.

(l) 6 Madd. 192.

(m) 3 B. & Ald. 632.

(n) 12 A. & E. 431.

(o) Id. 451.

Carrington v. Pell 3 Selw. 48. 513.

had mistaken or was misinformed of the number of children, where there was no evidence of actual knowledge; but it cannot make such a presumption in this case, and must attribute the intention to the testatrix, in her subsequent wills, to adhere to the intention shewn by her will of 1825, of giving 500*l.* only to each of the three children who were then living.

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Mr. R. Palmer and Mr. Hobhouse, for other defendants.

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Evidence is clearly admissible to shew, whether, when the last will of 1844 was made, Mrs. Waring had any lawful children, and how many. It is proved or admitted, and for every purpose in the cause must be taken, that she then had nine lawful children living, all born before the making of the will.

The first question then is, whether, upon the assumption of the inadmissibility or of the absence of parol or other evidence, to shew that the testatrix intended a benefit in favour of some only of the nine children, the bequest is void for uncertainty. Such a construction would be unnecessarily harsh, and not according to sound principles of jurisprudence, and would be opposed to authority.

I apprehend, that, upon the assumption just mentioned, I am bound to say, that the bequest is to be construed as if the word "three" had been omitted, or had been the word "nine."

Suppose evidence admissible to shew, and the evidence adduced to demonstrate, that the testatrix intended some only of the nine children to take, but the evidence insufficient to shew which of them she intended to take—is then the bequest void for uncertainty? This is a question which I would rather not answer without necessity, and there is here I think no such necessity.

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Assuming the competency of all the witnesses, and the admissibility of the whole of the evidence, (although I purposely avoid deciding at least the latter point), I am of opinion, that the evidence is not sufficient to support a judicial determination against the claim of the six younger of the nine children to be legatees as well as the three elder, and that all the children must have 500*l.* each.

I have come to this conclusion rather unwillingly, because it differs from that of the Master, and because, probably, if the testatrix herself could interfere, she would reverse my decision and maintain his.

Neither allowing nor disallowing the exceptions, I make the declaration upon them and the further directions.

Mr. *Hobhouse* said that his client, one of the defendants, was an annuitant; and he asked, that the annuity might be valued and paid, as was done in *Wroughton v. Colquhoun* (a).

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The decree in this respect may follow that case.

(a) 1 De G. & S. 357.

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SALMON v. GIBBS.

Feb. 17th.

J. H. LAMBE, by his will, dated in the year 1821, bequeathed 5000*l.* 3½ per Cent. Bank Annuities, to trustees, and directed them to pay the dividends to Elizabeth, the wife of H. Rider, for life, for her separate use; and after her death, to stand possessed of the capital, upon trust, for all and every the children and child of Elizabeth Rider, born or to be born, at such age or time, or ages or times, and if more than one, in such shares or proportions, and subject to such provisions, conditions, annual payments, and limitations over, the same to be for the benefit of some or one of such children, as she should by deed or will appoint; and in default of such appointment, upon trust, for all her children equally, the shares of sons to vest at the age of twenty-one years, and the shares of daughters to vest at that age or marriage.

Mrs. Rider had four children,—two sons who died without having attained twenty-one, and two daughters, Elizabeth Rider, and Mercy Rider, afterwards the wife of Robert Salmon.

By a deed-poll, dated the 17th of June, 1839, Mrs. Rider appointed 4800*l.* stock, part of the 5000*l.* stock, subject to her own life interest, to her daughter, Elizabeth Rider, absolutely.

By an indenture, dated the 18th of June, 1839, made between Miss Rider, of the first part, Mrs. Salmon, of the second part, and H. Thompson and W. Nortcate, of the third part, it was witnessed, that, in consideration of natural love and affection, Miss Rider assigned to Henry Thompson and W. Northcate the sum of 2300*l.* stock, part of the sum of 4800*l.* stock appointed by the deed-poll, upon trust, after Mrs. Rider's death, to pay the dividends to Mrs.

The donee of a power of appointment of a fund among her children, to whom the fund was limited in default of appointment, had only two daughters, and apportioned nearly the whole of the fund to one of them, who was unmarried, on an understanding, but without any positive agreement, that the appointee would re-settle one moiety of it on trusts for the separate use of the other daughter, who was married, exclusively of her husband, and, after her death, on trusts for her children. A re-settlement was accordingly made, without the privity of the married daughter, who did not hear of the transaction until several years afterwards:—*Held*, on the suit of her husband, that the appointment was invalid, and a settlement was

directed to be made of the married daughter's share.

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Salmon, for her life, for her separate use, without power of anticipation; and after her decease, to stand possessed of the capital, on the trusts therein mentioned, for the benefit of the children of Mrs. Salmon. The deed gave to Mrs. Salmon a power for the appointment of new trustees. It appeared from the evidence, that the deed of the 17th of June was executed with the understanding that Miss Rider should make the settlement contained in the deed of the following day, but without any express agreement to that effect.

The deed of the 18th, was not executed by Mrs. Salmon, nor did she ever hear of it until February, 1845, when she was applied to to execute a deed for the appointment of a new trustee, under the power contained in it for that purpose. She at first declined to execute the deed, but afterwards consented to do so.

The present suit was instituted by her husband, Robert Salmon, against her and their children, and also against Miss Rider and the trustees. The bill stated, that the plaintiff had only recently discovered the facts above stated, and prayed that the deeds of June, 1839, might be declared to be void, as being a fraud upon the power.

It was admitted at the bar that the assignment was not executed by Mrs. Salmon before 1845.

Mr. *Wigram* and Mr. *Southgate* for the plaintiff, cited *Daubeny v. Cockburn* (a), *Tucker v. Tucker* (b), and *Jackson v. Jackson* (c).

Mr. *Russell* and Mr. *T. H. Terrell* for Miss Rider.—The utmost extent to which the argument can be carried is, that the transaction was in substance an appointment to persons who were not objects of the power. But it is consistent with all the decisions, that an appointment to persons not

(a) 1 Mer. 638.

(b) M'Cl. 424.

(c) 2 Cox, 35.

objects, with the approbation of the real object of the power, is sufficient. If there had been an appointment to the separate use of Mrs. Salmon, and she had settled the fund appointed, the transaction could not have been questioned. What difference can it make that Miss Rider was the appointee, and made the settlement? The appointment is approved of by the only objects of the powers, Miss Rider and Mrs. Salmon, which is all that is required. The plaintiff has no right to complain, for he is neither an object of the power, nor entitled in default of appointment.

[They cited Sugden on Powers, p. 261, *Lane v. Page* (a), *White v. St. Barbe* (b).]

Mr. Speed for Mrs. Salmon.—No corrupt motive for the appointment is imputed to the donee. Nor was the appointment made in consequence of any agreement by which Miss Rider would have been bound. She might have disposed of the appointed fund in any way which she thought proper. At all events, the plaintiff has no title to disturb the transaction, because the trust for his wife's separate use is clearly within the scope of the power, and excludes him from any present interest; and the Court would settle her share in the unappointed part, if the appointment should be held to fail to any extent. He cited *Tucker v. Sanger* (c), *Goldsmid v. Goldsmid* (d), *Lee v. Fernie* (e), *Limbard v. Grote* (f), *M^{rs} Queen v. Farquhar* (g), *Doe v. Jackson* (h), *Jackson v. Jackson* (i), *Campbell v. Horne* (k), *Laystone v. Blackstone* (l), *Routledge v. Dor-*

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- (a) Amb. 233.
- (b) 1 V. & B. 399.
- (c) 13 Price, 607, 625.
- (d) 2 Hare, 187.
- (e) 1 Beav. 483.
- (f) 1 My. & K. 1.

- (g) 11 Ves. 467.
- (h) 1 M. & Rob. 553.
- (i) 1 C. & F. 917.
- (k) 1 Y. & C. C. C. 644.
- (l) Amb. 289.

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rell (a), Thompson v. Simpson (b), Kampf v. Jones (c), Kenworthy v. Bats (d), Baily v. Lloyd (e).

Mr. *Freeling* appeared for the trustees of the fund.

Mr. *Glasse* for the trustees of the will.

The VICE-CHANCELLOR:—

Some, at least, of the cases mentioned during the argument are undoubtedly binding authorities; and upon those (if any) which are not so, I do not think it necessary, for the purpose of this cause, to pronounce an opinion, as the decree which I shall make will be consistent with all of them.

If the transactions of 1839 could have been treated as an appointment to Mrs. Salmon, for her separate use absolutely, and an assignment by her, it is probable, or certain, that those transactions might have been supported. But I am of opinion that they cannot be so treated. It is not in evidence that Mrs. Salmon approved, or knew, or even heard of them until 1845.

She was a married woman during the whole of the intervening period; and her husband, it is quite clear, never approved of them. Then how does the matter stand? There is an appointment of the greater part of the fund to Miss Rider, in pursuance of a bargain, according to which she was to settle a part upon her sister and her sister's children, and it does not appear that the sister had been consulted on the subject.

The best way and the right way will be to reject the whole. I shall declare that the appointment and settlement are void, and shall refer it to the Master to approve

(a) 2 Ves. jun. 362.

(b) 1 D. & W. 487.

(c) 2 Kee. 756.

(d) 6 Ves. 793.

(e) 5 Russ. 330.

of a proper settlement in respect of one moiety on Mrs. Salmon. The other moiety will be paid to Miss Rider. The costs of all parties must come out of the fund.

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DAVIES v. THORNS.

Feb. 23rd.

ROBERT ELLIOTT, by his will, dated the 27th of May, 1831, bequeathed 1,000*l.* sterling unto such person or persons, and in such proportions, as his wife should by any deed, or by her last will and testament in writing, nominate and appoint; and in default of such nomination and appointment he gave and bequeathed the said sum of 1000*l.* unto her surviving brothers and sisters. The testator died in July, 1831.

Elizabeth Elliott, his widow, by her will, dated the 1st of November, 1833, bequeathed, to her brothers and sisters, to the children of a deceased sister, and to four other persons not related to her, legacies amounting together to exactly 1,000*l.* The testatrix then bequeathed all her clothes to one of her sisters, and appointed executors. There was no reference in the will to the power of appointment under the will of her husband.

Independently of the fund subject to the power, her assets were altogether insufficient for the payment of the legacies, and one question was, whether in these circumstances the latter will could take effect as an execution of the power given by the former.

Another question was, to what period the word "surviving" referred, if the power were held not to have been exercised.

Mr. Russell and Mr. Bigg for the plaintiffs, who claimed

The circumstances that a testatrix had not nearly sufficient property of her own to satisfy the legacies bequeathed by her, and that the legacies added together exactly amounted to a sum over which she had a power of appointment by will, held not sufficient grounds for deciding that the will (executed before the Wills Act of 1837 came into operation) was a good execution of the power, there being no reference to the power in it. Request to such persons as the testator's wife should appoint, and, for want of appointment, to her "surviving" brothers and sisters—*Held*, to refer to brothers and sisters who survived her.

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under the limitation in default of appointment.—The state of the testatrix's assets cannot be looked at for the purpose of determining whether she intended to exercise the power: *Jones v. Tucker* (a). In that case, Sir W. Grant would not direct an inquiry as to the state of the assets, although he said, that, in his private opinion, he thought that the intention was, to give the 100*l.* which the testatrix had power to appoint. In *Jones v. Curry* (b), which is another authority, Sir T. Plumer said, "Whatever is the inadequacy of a testator's property to satisfy the terms of the will, and whatever may be the conviction of the Court of his intention to execute the power, the state of the personalty, at the time of the will or the death, cannot be examined for the purpose of collecting evidence of his intention."

Mr. Parker, Mr. Osborne, and Mr. Villiers, for the different defendants.—In *Forbes v. Ball* (c), before Sir W. Grant, after his decision in *Jones v. Tucker* (d), that learned judge held a legacy bequeathed under circumstances very much resembling those of the present case, to be an execution of a power. And in *Lowndes v. Lowndes* (e), Lord Chief Baron Alexander decided to the same effect, although *Jones v. Tucker* was cited. In *Mackinley v. Sisson* (f), Sir L. Shadwell expressly founds his decision on the circumstance of the testatrix having no property to answer the legacies. [*Churchill v. Dibben* (g) was also referred to.]

On the second question, *Holloway v. Holloway* (h) and *Ware v. Rowland* (i) were cited.

The VICE-CHANCELLOR :—

The question in this case is, whether the correct inter-

(a) 2 Mer. 533.

(b) 1 Swanst. 66.

(c) 3 Mer. 437.

(d) 2 Id. 533.

(e) 1 Y. & J. 445.

(f) 8 Sim. 561.

(g) 9 Sim. 447.

(h) 5 Ves. 399.

(i) 2 Phil. 635.

pretation of the language used by the testatrix is, to attribute to her an intention to make a gift, not of her own property, but out of the property of her husband.

It rests with those who contend that the words which the testatrix has used are not to receive their ordinary interpretation,—who say that she did not mean to give her own property,—to demonstrate the correctness of that proposition. They cannot prove it by any reference in her will to the instrument creating the power, for there is none; they cannot establish their proposition by any reference in the will to the property subject to the power, for there is none. It is said, however, that her own property was of inconsiderable amount at the time; and that it is in a very high degree improbable that she had an intention to give anything else than that of which she could dispose under the power, the pecuniary legacies added together being identical in amount with the fund over which she had the power of appointment.

According to authority, the circumstances of legacies being identical in amount with a fund subject to a power, and of the insufficiency of the donee's own property to answer the bequests given by the will, are not enough to raise more than a conjecture, and, therefore, not enough to form grounds of judicial determination.

The cases cited at the bar do not negative such a rule. *Lounds v. Lounds* was a case decided by a judge, whose opinion is entitled to the highest respect and consideration; but probably there was in that case substantially a sufficient reference to the property subject to the power. The will, which was attested according to the power, was thus—"It is my will and mind, that 500*l.* shall be sold out of the funds as soon as convenient after my decease, and the 2000*l.* to remain in the funds during my wife's life, and the interest arising from the same to be equally divided amongst my dear wife, my son William, and my daughter

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Ann, share and share alike; and it is my will that 1000*l.* shall remain in the funds, and my daughter Ann Horny-croft to receive the dividends, as they become due, on the funds, during her natural life, and at her death, the 1000*l.* to be equally divided among her children, share and share alike; and the other 1000*l.* that I have in the funds unto my son William Lownds, at my wife's decease."

In that case it was said by one of the counsel, and it has been now said at the bar, that *Jones v. Tucker* was opposed to *Forbes v. Ball*, but in a note to *Lownds v. Lownds*, I find this statement with reference to the case of *Forbes v. Ball*:—"The question as to the state of the property of A. C., at the time of making her will, does not seem to have been agitated."

The two cases may probably be reconciled: for when I refer to the report of *Forbes v. Ball*, I find it to have been held, that the words in the will of the donor of the power, raised a trust for the relations of the donee, subject to her appointment. When, therefore, it was once decided that there was a trust for the relations, in default of appointment, the question of valid execution of the power became probably of little or no importance, because the only next of kin of the donee was a lady of the name of Ball, and she and her children were the persons to whom the appointment was made. They were in the cause opposed by the residuary legatees who could, according to the decision of the Court, have no interest in the question as to the execution of the power, for the Court having held that there was a trust for relations, the fund could not fall into the residue, as was contended.

The question was not, therefore, I may say, adversely argued; and I cannot attribute to Sir *William Grant* (who had just before decided *Jones v. Tucker*), the expression of an opinion, at variance with his former decision, upon a point that was not contested.

I must, I fear, decide against what may not improbably have been the intention of the testatrix, that the power of appointment has not been exercised.

With reference to the question of survivorship, I think that, on principle and authority, the true construction of Robert Elliott's will is, that "surviving brothers and sisters" means brothers and sisters living at the death of his widow.

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By the decree, the sisters of the wife living at her death were declared entitled to the 1000*l.*, as in default of appointment; an account of the principal and interest of the 1000*l.* was directed; and the costs of all parties, as between solicitor and client, were ordered to be paid out of the fund.

GORDON v. HOPE.

Feb. 23rd.

THE question in this suit arose upon the construction of a settlement, dated 23rd July, 1784, and made in contemplation of a marriage then intended and afterwards solemnized between George Gordon and Ann Fischer, whereby the intended husband and wife covenanted, that, as soon as the marriage should take place, the whole fortune of Ann Fischer, to the amount of 50,000 rupees, more or less, should be vested in the trustees, upon trusts for investment and payment of the income thereof to George Gordon for life, and after his decease to Ann Fischer for her life, and after the decease of the survivor upon trust to pay, divide, and apply the principal to, amongst, and equally between all and every "the children and issue" of George Gordon,

By a marriage settlement, a sum of money was settled upon trusts for the husband for life, then for the wife for life, and, after the death of the survivor, upon trust to pay the principal among all the children and issue of the intended husband, to be by him begotten on the body of the intended wife; and if there

should be no child or issue of the marriage, or, being such, they should all die in the lifetime of the survivor of the husband and wife, upon other trusts:—*Held*, that the children of the marriage, including those dying in the lifetime of the survivor of the husband and wife, took the fund, and that no other issue were entitled.

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Sturt v Braithwaite. 5 Dec. 48. 375.

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"to be by him begotten on the body of his then intended wife, (if more than one, share and share alike)," to be transferred and paid unto such of them as should be a son or sons at his or their respective age or ages of twenty-one years, and to such of them as should be a daughter or daughters at her or their age or ages of twenty-one years, or day or days of marriage respectively, which should first happen after the decease of the survivor of George Gordon and Ann Fischer; and it was declared, that the income, or a competent part thereof, should in the meantime, and until the same should have become due and payable "to the children and issue" of the said then intended marriage as aforesaid, be applied in their education and maintenance; and in case there should be "no child or issue" of the said intended marriage, or, there being such, all of them should happen to die in the lifetime of George Gordon and Ann Fischer, or the survivor of them, then the trustees were to hold the trust funds upon trust to pay on the decease of Ann Fischer (if George Gordon should be then living), one moiety to such persons as Ann Fischer should appoint, and in default of appointment, to her next of kin; but if Ann Fischer survived George Gordon, and there should be no child or issue of the marriage living at his decease, upon trust to pay the whole to Ann Fischer.

There were three children of the marriage. The wife died in 1806, the husband in 1840.

One was John Gordon, who died in 1822, in the lifetime of his father, having attained twenty-one, and having had only three children, two of whom survived their grandfather, George Gordon (the husband), and two grandchildren, who also survived their great-grandfather, George Gordon, and no other issue.

Another child of the marriage, George Gordon the younger, died in the lifetime of his father, without having been married.

The remaining child was the plaintiff, Helena Frances Gordon, who, of all the children, alone survived her father.

She was of unsound mind, and sued by a next friend. The bill sought payment of the whole fund for her benefit.

The executrix of John Gordon, by her answer, claimed one moiety of the fund; but his children and grandchildren submitted, that the fund ought to be divided into five parts, one to be paid to the plaintiff, one to each of the children, and one to each of the grandchildren of John Gordon, as the only issue of the marriage who survived George Gordon and Ann Fischer.

Mr. *Bacon* and Mr. *J. H. Law*, for the plaintiff, contended, that the context of the settlement shewed clearly, that, by issue, children only were meant; and that, as the children who died during the life of the husband, could not have taken anything under the words of the will, if the plaintiff had died also during that period, the circumstance of her surviving could not have been intended to benefit any one but herself; and that, therefore, she was entitled to the whole fund.

Mr. *Lloyd*, for the executrix of John Gordon, contended, that his estate was entitled to participate in the fund, there being no words or necessary implication to restrict the gift to children who survived the husband and wife. He cited *Schenck v. Legh* (a), *Howgrave v. Cartier* (b), *Clutterbuck v. Edwards* (c), and *Whiting v. Force* (d).

Mr. *Wigram* and Mr. *Swift*, for two of the grandchildren, contended, that the word 'issue' must have its ordinary interpretation. They cited *Wyth v. Blackman* (e), *Dalzell v. Welch* (f), and *Evans v. Jones* (g).

(a) 9 Ves. 300.

(b) 3 V. & B. 79.

(c) 2 Russ. & M. 577.

(d) 2 Beav. 571.

(e) 1 Ves. sen. 197.

(f) 2 Sim. 319.

(g) 2 Coll. 516.

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Mr. *Martelli*, for a grandchild who had died during the life of the husband, contended, that the estate of this child was entitled to a share.

The VICE-CHANCELLOR held, that, according to the true construction of the settlement, the three children of the marriage, the plaintiff and John Gordon and George Gordon, took the whole fund, as tenants in common.

The decree directed the residue of the fund, after payment of costs, to be divided into three parts: one-third to be transferred to the account of the plaintiff, after deducting certain sums expended for her maintenance, one-third to be paid to the administratrix of John Gordon, and the remaining third to the legal personal representative of George Gordon the younger.

March 8th.

WILLIAMS v. SOUTH WALES RAILWAY COMPANY.

The time within which a railway Company was authorised to take lands expired on the 4th of August, 1848. Long before this period they gave notice to a landowner to

treat, and afterwards delivered to the plaintiff, to whom the lands had been in the meantime devised, a bond, and paid the estimated value of the lands comprised in the notice into the Bank under the Lands Clauses Consolidation Act, 1845, s. 80. Under an Amendment Act, the powers of which extended beyond 1848, the Company were authorised to take the land included in the notice; and, on August 3rd, 1848, they gave a notice to the plaintiff, that, in pursuance of the powers of both those Acts, they intended to take the lands. After the 4th of August, 1848, but without taking any further steps under the Acts, the Company entered upon the land. On a motion for an injunction, the Court declined to interfere, on the ground that, although the Company might not be then entitled to take possession under their compulsory powers, they were able, by some proceeding under the second Act, to obtain the land; and the motion was ordered to stand over, with liberty to the plaintiff to bring an action.

after the expiration of three years from the passing of the Act. The Act was passed on the 4th of August, 1845.

Prior to and in the year 1845 Mr. Henry Williams, since deceased, was seised, in fee simple, of land in the parish of St. Mary, Cardiff, through which the line of the intended railway passed, according to the provisions of the Act.

On the 26th of June, 1846, the Company, in exercise of their powers, gave notice to Mr. Henry Williams, that parts of his land, containing 1A. 1R. 14½P., as described in a plan referred to in the notice, were required for the line; and that it was their intention to contract for the same; and Mr. Williams was required to deliver at the office of the Company a statement in writing of the particulars of his estate and interest, and of the claims he made in respect thereof.

Negotiations were thereupon entered into between Mr. Williams and the Company for the sale to them of the pieces of land comprised in the notice; but no arrangement was come to.

On the 2nd of March, 1847, Mr. Henry Williams died, having by his will devised all his real estates to Mr. Evan Williams.

No arrangement having been come to, the Company, pursuant to the provisions of the Lands Clauses Consolidation Act, gave Mr. Evan Williams, a bond, dated the 7th of August, 1847, under their corporate seal, and also under the hands and seals of the directors, reciting that the Company had paid into the Bank of England 2506*l.* 14*s.* 5*d.*, being the value of the interest of Mr. Evan Williams in the lands.

The 2506*l.* 14*s.* 5*d.* was duly deposited; but, the Company did not enter into possession of the land or take any steps for compelling the sale of it to them, until after the 4th of August, 1848, when the period limited by "The South Wales Railway Act, 1845," for the exercise of

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the powers thereby given to the Company for the compulsory purchase of lands for the purpose of that Act, expired.

An Act, called "The South Wales Railway Amendment Act, 1847," was passed on the 2nd of July, 1847, by which the Company was empowered to make certain deviations in their line of railway; and for those purposes they were authorised to enter into and take certain lands delineated in plans referred to in the Act.

This deviation extended to, and comprised that portion of the line which passed through Mr. Evan Williams's lands.

After the passing of the Amendment Act, and after the bond had been delivered, the Company served upon Mr. Evan Williams a notice, dated the 3rd of August, 1848, signed by the secretary of the Company: stating that, in pursuance of the two Acts, and of the Acts incorporated therewith respectively, the line of the railway would pass through certain pieces of land of Mr. Evan Williams, described in the plan referred to in that notice; and that it was their intention to take the same, and to contract for the purchase thereof, and requiring Mr. Evan Williams to deliver the particulars of his estate and interest therein, and of the claim he made in respect thereof.

The land was described as containing 1A. 3R. 21P., it comprised, among other lands, the same lands as were referred to in the former notice of the 26th of June, 1846.

The Company did not deposit in the Bank any sum on account of the land comprised in the second notice, or give to Mr. Evan Williams any bond according to the provisions of the Lands Clauses Consolidation Act, 1845.

On the 20th of January, 1849, the Company, without the consent of Mr. Evan Williams, entered upon the lands comprised in both notices, and began the construction of their railway upon the lands notwithstanding the remonstrances of Mr. Evan Williams and his solicitor.

Under these circumstances, Mr. Evan Williams filed his bill on the 6th of February, 1849, against the Company, charging that the Company intended to pull down the messuages and cottages on the land, and to form their railway on the site; the bill also charged, that the Company were constructing their line over the plaintiff's land not according to the deviation authorised by the Act of 1847, but according to the original line under that of 1845.

The bill prayed that the Company might be decreed to deliver up to the plaintiff the possession of the land, and might be restrained from continuing in possession, and from removing the gravel and materials thereon, and from constructing their line of railway across the land.

An interim order was obtained on the 13th of February, 1849, *ex parte*; and leave was given to serve a notice of motion, the 17th of February, 1849.

The interim order was by consent continued till the hearing of the motion.

Mr. Bacon and Mr. *Frestling* in support of the motion for the injunction.—The Company had no authority to enter on the land under their first Act, after the powers given to them for that purpose had expired. In *Brocklebank v. Whitehaven Junction Railway Company* (a), Sir L. *Shadwell* thought it quite plain that the compulsory powers of a Company to take land ceased on the day limited by the Act creating those powers; and his Honor granted an injunction. It appears from the same report that the Lord Chancellor on appeal continued the injunction, although he directed a case for the opinion of a Court of law, saying, that he was justified in allowing the opinion of the Vice-Chancellor to have so much weight as to induce him to think that there was reasonable probability, at least, that a Court of law might be of opinion, that the

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(a) 15 Sim. 632.

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Company had no such right as they claimed. In the present state of the authorities, therefore, this probability must be considered, at all events, sufficiently great to entitle the plaintiff to an injunction till the question can be decided.

If the entry of the Company is put on any authority given to them by the second Act, the answer is, that they have not complied with any of the conditions to give them title to take possession. The Company are therefore mere trespassers.

[They also cited *Tauney v. Lynn and Ely Railway Company (a).*]

Mr. *Kenyon Parker* and Mr. *G. L. Russell*, for the Company, were not called on.

The VICE-CHANCELLOR said :—

Considering the fact of the deposit of the money in the Bank, and the execution of the bond ; considering also the other facts of the case ; and, further, considering that if the acts of the Company hitherto have been insufficient to acquire for them a title or right to the land, they will be able, by some proceeding under the second statute, to obtain it—I think it improper to interfere at present by an injunction.

Let the motion stand over without prejudice to any question, with liberty to the plaintiff to bring any such action as he may be advised.

(a) 4 Railw. Cas. 615.

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FARWELL v. SEALE.

March 10th.

A TESTATRIX named Grace Chalwich, being seised of the reversion in fee in certain lands and hereditaments contingent on the death of one John Burrige Chalwich, without leaving issue male who should attain the age of twenty-one years, by a codicil to her will, dated the 2nd of March, 1792, devised this reversion, and directed that the same should be held in trust for and be conveyed to Charles Kitson and William Kitson, and their heirs, in trust, (after limitations which did not take effect), immediately after the falling in of such reversion, to sell and dispose of the said lands and hereditaments, and to divide the rents and profits thereof until such sale, and also the purchase-money arising from the sale, into five shares, and pay and divide one-fifth part thereof to Mrs. Admonition Strode and her two daughters; one other fifth part to Thomas Lear, in trust for Sarah Lear; one other fifth part thereof to Mary Ann Lear; one other fifth part thereof to Grace Lear; and the remaining fifth part to Thomas Lear.

Sarah and Mary Ann Lear died; and under their wills Thomas Lear became beneficially entitled to their two fifth parts of the money to arise from the sale directed by the above-mentioned codicil.

Thomas Lear, by his will, dated the 23rd of December, 1818, gave and devised to the plaintiff and four other trustees, whom he also appointed his executors, and to the survivors and survivor of them, his, her, or their heirs, executors, administrators, or assigns, all and every the sum or sums of money which he would be entitled to receive by virtue of the wills of the said Grace Chalwich, Mary Ann Lear, and Sarah Lear, and which were to accrue from the sale of the lands devised to Charles Kitson and William Kitson as aforesaid, upon trust, with all convenient speed, after his

A cestui que trust of a portion of the proceeds of a contingent reversionary interest in an estate directed to be sold, in case of and upon the happening of the contingency, bequeathed his reversionary interest by his will to a legatee, who sold the same before the happening of the contingency. The executor was a party to the assignment, to obviate all question as to the existence of debts of the cestui que trust, and the purchase-money was thereby expressed to be paid to him, but was in fact paid to the legatee by the purchaser:—*Held*, that the executor had no claim on the purchaser to be reimbursed the legacy duty, which, after the happening of the contingency, he was compelled to pay on the full value of the share.

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decease, to sell the same for the purpose of paying his debts and the debts of his brother William Chalwich Lear in the manner therein mentioned; and in case any overplus money should remain in the hands of the said trustees, or the survivors or survivor of them, after such payment, or if any of the trust lands and hereditaments should remain unsold, the trustees were to be possessed of the overplus money, (which was to be considered as land and laid out in Government security accordingly,) and of the lands and hereditaments remaining unsold, to the use of his nephew William Thomas Lear, his heirs and assigns.

Thomas Lear died on the 6th of September, 1821, and his will was proved by the plaintiff, Grace Lear, and Dolly Lear, three of the executors and executrixes.

By an agreement, dated the 5th of August, 1828, and made between William Thomas Lear, (by the plaintiff George Farwell, his attorney,) of the one part, and William Lamb Hockin, gentleman, of the other part; after reciting that the said William Thomas Lear, (expectant on the decease of John Burr ridge Chalwich, in the event of the said John Burr ridge Chalwich departing this life without having any son lawfully begotten, who should live to attain his age of twenty-one years,) was entitled to three fifths of the money to arise from the sale of the manor and Barton of Bagonizeal, Kingwell, and Pepper Chuck's Lime Kiln, and Cottage Havry Parks, Hamlyn's Combe Lower Meadow, and the Lord's Wood, then in the possession of the said John Burr ridge Chalwich, his tenant or tenants: It was agreed, that William Thomas Lear should deduce a good marketable title to the monies that might arise from such sale as aforesaid, and deliver an abstract of his title thereto; and that his executors, administrators, or assigns should, on the said 5th day of August, execute, by good and sufficient conveyances, unto the said William Lamb Hockin, his executors, administrators, or assigns, of all his reversionary right and interest

of, in, and to the said three fifth parts of the money to arise from such sale of such hereditaments and premises; and on the execution of such conveyance, William Lamb Hockin agreed to pay unto Thomas Lear the purchase-money of 6850*l*. And it was agreed that, in explanation of that contract, in case any dispute should arise thereon, the same should be settled by reference to certain conditions of sale, bearing date the 14th day of July then last.

The particulars or conditions of sale referred to in the memorandum of agreement contained the following statement: "It must be understood that the interest now offered for sale is to be sold subject to every incumbrance that can or may by any possibility affect it, either in law or equity, and to a proportion of the expenses of the sale and making out the title."

In pursuance of the above agreement, an assignment was executed, dated the 5th day of November, 1828, between William Thomas Lear, of the first part; the plaintiff, Grace Lear and Dolly Lear, as executrixes of Thomas Lear, of the second part; the plaintiff (in his character of administrator with the will annexed of Sarah Lear deceased), of the third part; the plaintiff (in his character of administrator with the will or testamentary schedule annexed of Mary Ann Lear deceased), of the fourth part; and Sir John Henry Seale, of the fifth part; and thereby, after reciting to the effect hereinbefore stated, and further reciting that William Thomas Lear, with the consent of the plaintiff, Grace Lear, and Dolly Lear, had contracted with Sir John Henry Seale for the sale to him of the said three-fifth parts of the money to arise from such sale as aforesaid, at or for the price or sum of 6850*l*.; and that, for the securing the said Sir John Henry Seale, and to avoid the necessity of his inquiring whether all the debts, funeral and testamentary expenses, and legacies of Sarah Lear, Mary Ann Lear, Thomas Lear, and William Chalwich Lear, had been paid off, it had been

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agreed that the said sum of 6850*l.* should be paid to the said several representatives of Sarah Lear, Mary Ann Lear, and Thomas Lear, in the following proportions, viz. one-third part thereof to each set of representatives, to be applied by them respectively in a due course of administration: It was witnessed, that in pursuance of the said recited agreement, and in consideration of 6850*l.* paid by Sir John Henry Seale, with the consent and by the direction of William Thomas Lear, in the manner thereafter mentioned, viz. one-third part to the said George Farwell, Grace Lear, and Dolly Lear, as the surviving executor and executrices of the said Thomas Lear; one other third part thereof to the said George Farwell, as the administrator with the will annexed of the said Sarah Lear; and the remaining third part to the said George Farwell, as the administrator with the will annexed of the said Mary Ann Lear; they, the said George Farwell, Grace Lear, and Dolly Lear, as such personal representatives as aforesaid, and each of them as to his and their rights and interests therein as such representatives, assured, and William Thomas Lear thereby also assured, unto Sir John Henry Seale, his executors, administrators, and assigns, all the three fifth parts of the purchase-money to arise from the sale of the said remainder or reversion expectant on the decease of the said John Burr ridge Chalwich, and the determination of the estate tail limited to his first and other sons as therein expressed.

John Burr ridge Chalwich died in May, 1835, without ever having had any lawful issue; and William Kitson, who was then the sole surviving trustee under the will and codicils of Grace Chalwich, in 1836, put up for sale the above-mentioned hereditaments, which, with a trifling exception, were sold to Sir John Henry Seale for 18,511*l.*

Out of the purchase-money, Sir John Henry Seale, as the equitable owner of three-fifths of the beneficial interest, retained 9405*l.* 14*s.* 10*d.*, being the amount of the three

fifth parts (after payment of a mortgage debt and the expenses of the sale).

The plaintiff was not a party to the conveyance to Sir John Henry Seale, nor was he consulted respecting the arrangement as to the mode of settlement between William Kitson and Sir John Henry Seale, such arrangement having taken place without his knowledge or concurrence.

In the month of March, 1846, the plaintiff, as executor of Thomas Lear, was called upon by the Commissioners of Legacy Duties, and he was in August, 1846, compelled, to pay to them 385*l.* 1*s.* 8*d.* for legacy duty upon the 9405*l.* 14*s.* 10*d.*, with interest from the time of the decease of John Burridge Chalwich down to the month of May, 1846, being a period of eleven years.

William Thomas Lear died in February, 1839, intestate, and left no assets whatever; and no person had taken or would take out letters of administration to his estate or effects.

The plaintiff, by the present suit, sought to obtain from the assets of Sir John Henry Seale, who had died, repayment of the amount paid by the plaintiff in respect of legacy. The bill stated the aforesaid facts; and also stated that the plaintiff and Grace Lear and Dolly Lear had joined in the assignment in the characters of executor and executrixes merely, at the request of Sir John Henry Seale, for the purpose of curing any objection which might be made in respect of any debts which might be payable under the will of Thomas Lear, and in consequence of a stipulation which Sir John Henry Seale had made upon the occasion of his purchase of the three-fifths:

Mr. *Russell* and Mr. *Whitbread* for the plaintiff.—The deed of assignment by itself, or at all events taken together with the agreement for purchase, constituted a contract on the part of the purchaser to purchase, subject to the legacy duty. It was evident to the purchaser

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that the duty had not been paid, and would become payable on the happening of the contingency on which the devise in favour of Thomas Lear and his sisters was to take effect. The purchaser knew that the whole purchase-money was paid to the legatee; and therefore that no amount had been reserved for the payment of the duty by the executor. Moreover, the legacy duty is a charge upon the legacy. If the legacy, instead of being sold, had been paid to the legatee, the executor could have recovered from him the amount of the duty, and the purchaser is in the same situation: *Jennings v. Bond* (a).

Mr. Bacon and Mr. Nevinson, for the defendants.—There was no contract on the part of the purchaser to pay the duty; the concurrence of the executor was an assent to the bequest on which the purchaser was entitled to rely. Before giving such assent, the executor must have been presumed to have been satisfied as to the legacy duty. The assent passed the entire legacy to the purchaser; and the executor became alone liable to the Crown: 36 Geo. 3, c. 52, s. 6; *Hales v. Freeman* (b).

The VICE-CHANCELLOR:—

How it would be correct to decide this case upon the assumption of holding the defendants bound or affected by the words in the conditions of sale, to which reference has been made, it is unnecessary to say, for I am of opinion that I cannot treat the defendants as bound or affected by those words, there being a deed of assignment executed on the completion of the purchase as long ago as the year 1828. Looking at the deed of assignment and the other circumstances, can I say that the possible liability to this legacy duty was in contemplation of any person when the contract was made or the sale completed? It

(a) 2 J. & L. 720.

(b) 1 Brod. & Bing. 391; see *Stow v. Davenport*, 5 B. & Ad. 366.

seems to be agreed, and I certainly am of opinion, that I cannot. The probability is, that no one thought of it; so that the plaintiff allowed the money to pass through his hands without taking any precaution in respect of such a liability, and Sir John Seale purchased without any notion of such a liability.

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It is not disputed, that, as long ago as 1828, the interest of William Thomas Lear was sold for a valuable consideration, and the money treated as being received by the plaintiff himself as to two of the shares, and by him and his co-executrixes as to the other. It was part of the contract that the money should be considered as having been so received. And in substance it must be so considered now. This suit was instituted more than nineteen years after the completion of the contract, and more than six years after the reversion had fallen into possession and Sir John Henry Seale had died. In such circumstances can I treat the plaintiff as having a better equity than Sir John Henry Seale? I think not. This bill must be dismissed, but without costs.

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March 12th.

NETTLETON v. STEPHENSON.

A testator devised estates, on trust, to pay the rents to a tenant for life; and after her death, on trust, to accumulate the same for twenty-one years from the death of the tenant for life, and, at the end of that period, to divide the accumulations among defined classes of objects, and with limitations in remainder after the expiration of the twenty-one years, but no residuary devise:—*Held*, that the time of distribution was not accelerated by the operation of the Thelusson Act; but that the rents accruing between the end of the legal period for accumulation and the time of distribution belonged to the heir at law of the testator.

THOMAS NETTLETON, by his will, dated the 4th of May, 1824, devised all his real estates in the county of York, upon trust, for Hannah Hallas for her life, and immediately upon her decease, upon trust, to let the whole of the said estates for the most rent which could reasonably be obtained, for twenty-one years; and upon the receipt of the rents, to place the same out yearly upon Government or real securities, and to receive the interest, and again place the same out at interest during the whole of the said term of twenty-one years; and upon further trust, at the expiration of the said term, to call in the whole of the said twenty-one years rent, and the interest and accumulations of interest thereon; and after deducting and reimbursing unto themselves all reasonable and necessary expenses attending the execution of the trusts, to divide the same equally amongst all and every the children, as well sons as daughters, of the testator's nephew John Nettleton, (except his two sons, Thomas and William, who were provided for), the sons and daughters of his nephew Joseph Nettleton, the sons and daughters of his nephew Francis Nettleton, and the sons and daughters of his niece Mary Terry, and John Nettleton the son of the testator's late nephew Thomas Nettleton, if he should be then living, and, if not, the testator gave his share to be divided into four equal parts, and paid unto and amongst the children of the said testator's said nephews and niece in manner aforesaid, or such of them as should be living at that time. And after the expiration of the said term of twenty-one years, the testator devised his said estates to Joseph Nettleton (son of his nephew Francis Nettleton) and his assigns, for life, with remainder to the use of his first and other sons in tail male, with divers remainders

over.

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The testator died in July, 1824, and Hannah Hallas in February, 1837.

The present suit was instituted by the heir at law, insisting that, under the Thelusson Act, the trusts for accumulation were inoperative, for the excess of the period of twenty-one years reckoned from the death of Hannah Hallas above the like period reckoned from the testator's death; and that the intermediate rents, being undisposed of, belonged to the plaintiff, there being no residuary devise.

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Mr. *Russell* and Mr. *Chapman Barber*, for the plaintiff, cited *Attorney-General v. Poulden* (a).

Mr. *C. P. Cooper*, Mr. *Malins*, Mr. *Glasse*, Mr. *T. C. Wright*, and Mr. *Nalder*, for various defendants claiming under the trust for accumulation, contended, that the only object which the testator had in the postponement of the distribution of the fund beyond the period of twenty-one years from the testator's death, to which the Thelusson Act restricted trusts for accumulation, was the benefit of the cestuis que trustent. As the Act precluded their receiving any benefit from the postponement beyond that period, they must, under the general intention of the will, be entitled, as soon as the lawful period of accumulation expired.

Mr. *Bacon* and Mr. *Elmsley* appeared for the trustees.

Mr. *Russell* replied.

The VICE-CHANCELLOR, who in the course of the argument referred to *Eyre v. Marsden* (b) and *Davidson v.*

(a) 3 Hare, 555.

2 Keen. 313; *Macdonald v. Bryce*,

(b) 2 Keen. 564; 4 Myl. & Cr.

2 Keen. 276.

231. See also *O'Neill v. Lucas*,

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Dallas (a), said at its close, that all the counsel had appeared to agree that the trusts of the accumulated fund would include all objects within the description of the classes comprised in the trust, coming into existence before the expiration of the twenty-one years during which the accumulation was directed to take place, and such was also his Honor's impression. With regard to the point in dispute, his Honor said, he could not accede to the argument that the period for distribution of the fund was accelerated by the operation of the Act of Parliament.

(a) 14 Ves. 576.

March 14th.

WOOD v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

On an application for an injunction to restrain a Railway Company from taking proceedings to summon a jury under the compulsory clauses of the Lands Clauses Consolidation Act, 1845, the Court thought that the plaintiff would have been entitled to an injunction, but for the circumstance that the time limited for the exercise of the compulsory powers was on the point of expiring; but that the doubt as to the validity of such proceedings after that period, although the usual notice had been given of the intention of the Company to take the land, was sufficient ground for declining to grant the injunction, on the Company undertaking not to act on the result of the jury process without the leave of the Court, and bringing into Court 200*l.* to answer the plaintiff's costs and charges by reason of the process, without prejudice to any question.

MR. KENYON PARKER and Mr. J. H. Palmer, for the plaintiffs, landowners, to whom the North Staffordshire Railway Company had given the usual notice of their intention to take lands belonging to the plaintiffs, moved for an injunction to restrain the Company from proceeding under the compulsory powers of the Lands' Clauses Consolidation Act, 1849, to have the value of the lands assessed by a jury. The ground on which the application was made was, that the Company had, by their conduct, bound themselves to abide by an award which had been made respecting the value of the lands, but the validity of which they disputed (a).

Mr. Malins and Mr. Crompton, for the defendants, resisted the motion, on the ground (among others) that the

(a) See *In re North Staffordshire Railway Company*, 6 Railw. Cas. 25.

time limited for the exercise by the Company of their compulsory powers, would expire in June, 1849.—They cited *Brocklebank v. The Whitehaven Junction Railway Company* (a).

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The VICE-CHANCELLOR:—

Upon the mere legal question, I had rather not give any opinion without necessity. I think that no such necessity at present exists.

I do not say whether, in my judgment, the award is legally good or legally bad; or whether, if the award is bad, the Company, considering the dispute with respect to some part of the land in question, can properly require a jury to ascertain the value of that land only as to which there is no dispute.

However these questions ought to be decided as legal questions, I have to consider what took place before the arbitrator and the umpire; and were I under the necessity at the present moment of deciding to which set of representations of what is alleged to have taken place, faith ought to be given, I have no hesitation in saying that, for the present purpose, I should answer that question in favour of the plaintiff.

I am not therefore prepared to say, that the legal rights of the parties would decide the case; and considering the expense as well as the consequences to the parties in other respects of proceedings before a jury, my opinion, subject to what I am about to say, is, that the injunction ought to go, on the plaintiff's entering into proper undertakings.

But my difficulty, my only difficulty, is with reference to the near approach of the time fixed for the expiration of the powers of the Company. There may be questions as to the right to summon a jury after this time, and it may be impossible to place the Company in the position in

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which they ought to be. On this point alone I wish to hear a reply.

Mr. *K. Parker*, in reply.—It is the Company's own fault that they have allowed the time nearly to expire; and a landowner ought not to be prejudiced by their negligence.

Mr. *Malins*, for the defendants, offered to bring into Court a sufficient sum to answer the expenses of the jury process.

The VICE-CHANCELLOR:—

As far as I can with propriety at this stage of the cause form any opinion as to its merits, my opinion is, I repeat, in favour of the plaintiffs. This, however, is not the stage of the proceedings at which the merits can be determined. The proximity of the time for the expiration of the Company's powers is, I repeat, the only reason which induces me to refrain from interfering by injunction. On the Company bringing into Court a sum of money sufficient to answer the costs, charges, and expenses which the plaintiffs may incur by reason of the jury process, and undertaking not to act upon the proceedings before the sheriff without the leave of the Court, I refuse the motion.

It was arranged that 200*l.* should be brought into Court, without prejudice to any question; and with liberty for all parties to apply to the Court as they should be advised.

1849.

Re TOMLINSON.

THIS was the petition of the mother of an infant under the age of seven years, who was then in her custody, praying that she might be at liberty to retain such custody. She presented the petition by her next friend, and was living separate from her husband, the father of the infant, who had applied to Mr. Justice *Patteson* for a habeas corpus to have the infant delivered up. He had also instituted a suit in the Ecclesiastical Court for restitution of conjugal rights. The petition was intituled in the Matter of the Infant and of the Act 2 & 3 Vict. c. 54.

Mr. *Russell* and Mr. *J. V. Prior* supported the petition.

Mr. *Swanston* and Mr. *Steere*, on behalf of the father, opposed it, among other grounds, on that of the petition being wrongly intituled in the Matter of the Act 2 & 3 Vict. c. 54, which they insisted did not apply to a case where an infant was in the custody of its mother.

The case stood over for further evidence to be adduced, and for the purpose of ascertaining the exact position of the suit in the Ecclesiastical Court.

On these days Dr. *Addams* and Dr. *Travers Twiss* appeared for the respective parties, and argued the question of the validity of the mother's defence to the suit in the Ecclesiastical Court.

Further affidavits were also read.

The VICE-CHANCELLOR:—

If, independently of the Act of 2 & 3 Vict. c. 54, the Court could exercise jurisdiction in the matter of this

*March 19th,
30th, & 31st.*

If, independently of the Act of 2 & 3 Vict. c. 54, the Court can exercise jurisdiction upon the petition of a mother having the custody of her infant child, for the continuance of such custody, it may do so, although the petition is intituled in the matter of that Act as well as in the matter of the infant.

Where the mother of an infant under seven years of age, and having custody of it, is living separate from the father, and has a good defence to a suit by him for restitution of conjugal rights, the Court may make an order continuing to the mother the custody of the infant, such a case, although not within the letter, being within the equity of the 2 & 3 Vict. c. 54.

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petition, I think that it may do so notwithstanding that the petition is intituled in the matter of the Act as well as in the matter of the infant.

Assuming, however, that the petition is presented under the Act, I am of opinion, that although the child was at the time of the presentation of the petition and is still in the custody of its mother, the Court has within the equity of the Act jurisdiction to interfere.

When I use the expression "equity of the Act," I shall of course not be understood as meaning, that one interpretation is to be given to a statute in a Court of law and another in a Court of equity. I use the expression in the sense in which it is used as well by common lawyers as by equity lawyers.

It is probably true that the statute of 1839 has enabled or rendered justifiable the interposition of the Court of Chancery in some circumstances in which the Court could not or would not have acted independently of the statute, and with reference to some considerations, to which, but for the statute, it could not or would not have looked (a).

This petition presented by the infant's mother is one under which she is entitled to claim for him or for herself or for both such protection or benefit, if any, as the statute provides in such a case: and the child being not a fortnight more than two years old, the mother at the time of his birth having been living in a state of separation from his father, that separation having ever since continued and still continuing, the child being I think clearly proved to be a weakly child, requiring particular care, the mother's kindness and attention to him and his present state of comfort and security being unquestioned—as is her chastity; the proceedings also in the Ecclesiastical Court and those before Mr. Justice *Patteson* having begun before the petition was presented, and being in the state in which at present they are, I should have thought it right now to make an order

(a) See *Re Fynn*, 2 De G. & S. 457.

relating to the custody of the infant without directing the petition again to stand over, had there appeared to me to be a probability of the mother's success in the ecclesiastical suit, that is to say, in establishing that she is justified in living apart from her husband. But, judging as well as I can upon such a matter, I am of opinion, that it does not appear to be reasonably probable that she will so succeed. [His Honor, after stating the grounds on which he had come to this conclusion, continued—]

The petitioner however contends, that, according to the truth of the case, as capable of being laid before the Ecclesiastical Court and as proveable, she is justified in living apart from her husband; that his suit therefore, at least when defended, as she says that she can defend it, will fail; and that, whether it shall or ought to succeed or shall or ought to fail, she is, according to the real facts and merits, entitled to some such order as her petition asks. Now, whether she is right or wrong in this contention, or any part of it, must, I suppose, depend on evidence. But in that view of the matter she wishes, and perhaps reasonably, to add to the present evidence, that is, to file affidavits in reply to those filed on the part of the respondent, which certainly she has not yet had a sufficient opportunity of doing,—and his case was heard on the materials now before the Court under an express reservation of her right to adduce evidence in reply, if she should, as she does, wish to do so.

This being so, I abstain from saying more as to the weight or effect of the evidence in its present state, so far as it relates to disputed facts, beyond this remark, that it is my impression, that if the petitioner has further evidence of a material kind adducible, her counsel have taken the most advisable course for her in electing to avail themselves of the opportunity of doing so.

The infant being I think upon the undisputed facts a weakly child, at present under good care and in a state

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of comfort and security, what I do now is to direct the continuance of the undertaking already given until the 23rd of April or further order, with liberty to apply, and without prejudice to any question, and to order the petition to stand for further hearing on the 20th.

I may add that I have considered either the father or the mother or her next friend (I think it of no importance which) as appearing in substance and effect for the infant on the petition.

April 17th.

On this day the counsel for the petitioner and respondent said, that a reconciliation had taken place, and that an arrangement had been come to for dismissing the petition without costs; and that the proceedings before Mr. Justice *Patteson* were to be discharged, and the suit in the Ecclesiastical Court dismissed.

March 28th.

RUDD v. SPEARE.

In a suit to which a lunatic and his committee were defendants, the Court declined, before decree, to make an order, on motion, substituting a new committee as a defendant.

MR. PITMAN moved, that the name of a new committee of a lunatic defendant might be substituted for that of the former committee (who was also a defendant to the suit), without any supplemental bill. There had not yet been any decree in the cause. He cited Shelford on Lunacy, p. 564, 2nd edit., and *Lyon v. Mercer* (a).

The VICE-CHANCELLOR said, that he was not aware of this having been done before decree. If any precedent could be produced of such an order he would follow it.

None having been found, his Honor declined making the order sought.

(a) 1 S. & S. 356.

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BANKIER v. POOLE.

March 28th.

THIS was a motion for leave to serve a subpoena to appear and answer upon Mr. Molloy, a solicitor, as the agent of the defendants, who were out of the jurisdiction of the Court.

Order for substituted service to appear and answer on alleged agent and receiver of defendants, who were mortgagees in possession.

The defendants were mortgagees in possession of leasehold property, and the bill was filed on February 28, 1849, by the executors of the mortgagor, for redemption.

The affidavit of the clerk to the plaintiffs' solicitor in support of the motion stated, that Mr. Molloy had, since 1841, acted, and was still acting, as receiver of the rents of the mortgaged property for the defendants, and was also employed (as the deponent believed) as their solicitor; that, before the filing of the bill, the deponent had frequently applied to Mr. Molloy for his account as such receiver; and that Mr. Molloy had written a letter, stating, that the mortgagees must wait for the decision of the Ecclesiastical Court upon the probate of the will, which was then in the course of litigation; that, after probate was granted, Mr. Molloy sent two accounts to the plaintiffs' solicitor, for the years 1847 and 1848; one of such accounts being intitled "The account of Charles Molloy the receiver, with J. T. Poole and D. C. Poole, Esqs., mortgagees of the late Mr. and Mrs. Keating, Cr.;" that the defendants had been residing for some time past at different places on the continent; and that Mr. Molloy had, (as the deponent was informed by Mr. Molloy's managing clerk,) during the last vacation, gone to the continent, and would see the mortgagees on the subject of rendering the more detailed accounts which the plaintiffs' solicitor had required; that, since the filing of the bill, many applications had been made to Mr. Molloy, inquiring if he would accept service for the defend-

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ants, or would furnish their address, but that he had returned no answer; and that every exertion had been made, without success, to ascertain the defendants' address.

Mr. *Smythe*, in support of the motion, cited *Murray v. Vipart* (a), and *Cooper v. Wood* (b).

The VICE-CHANCELLOR said, that having regard to recent cases, he thought he might venture to make the order; and that, if it was wrong, the error was on the side of reason and justice.

(a) 1 Ph. 521. See, also, *Hurst v. Hurst*, 1 De G. & S. 694; *Skegg v. Simpson*, 2 De G. & S. 455; *Waller v. Darby*, 6 Hare, 618; *Hobhouse v. Courtney*, 12 Sim. 140; *Norton v. Hepworth*, 1 Mac & G. 54; and 4 & 5 Will. 4, c. 82, ss. 1 and 2. (b) 5 Beav. 391.

March 22nd
 & 30th.

DAWSON v. BRINCKMAN. |

An agreement was entered into for the purchase of a man-

THIS was a suit by vendors to enforce the specific performance of a contract for the purchase of a mansion-house, sion-house and lands, admeasuring about ninety-six acres, comprised in particulars with the following statement:—"The whole is freehold, except about eight acres, which is copyhold of the manor of C. (but undistinguished except as to not including any of the buildings)." Upon the abstract of title, one of the purchaser's requisitions was, that, as the abstract did not shew any connexion between the parcels described in the deeds abstracted and those set forth in the printed particulars, the vendors should establish the identity of the lands sold with those in the abstract. After some negotiation, but without compliance with this requisition, a supplemental agreement was entered into, by which possession was given up to the purchaser, he accepting the title subject to the vendors' producing a "declaration of identity of the lands mentioned in the deed to those sold." The vendors then produced a declaration, of which the purchaser's counsel approved, in proof of the local identity of the parcels, but not distinguishing the freehold from the copyhold parts. Subsequently, the purchaser procured evidence, shewing that it was highly probable that the mansion was built on the copyhold part of the property, and insisted that the vendor was bound to identify its site with the portion which was not copyhold. The vendors declined to furnish the necessary evidence. Upon a bill by them, to compel specific performance of the agreement:—*Held*, that the purchaser was not entitled to require such evidence of identity; and the Court decreed specific performance, with a declaration to that effect.

lands, and hereditaments situate at St. Leonard's, adjoining Windsor Park, in the county of Berks.

It appeared, that the property had been offered in two lots for sale by public auction on the 26th of August, 1846, but was not then sold. On the 9th of September, 1847, the defendant, Sir Theodore Henry Lavington Brinckman, Bart., entered into an agreement in writing with the agents of the plaintiffs, the vendors, for the purchase of the estate mentioned in the printed particulars, for the sum of 15,375*l.* including the timber, &c. By the agreement it was stated, that the purchaser had paid the sum of 1000*l.* as a deposit; and it was stipulated, that he should pay the remainder of the purchase-money agreeably to the conditions of sale. The particulars of the property referred to in the agreement stated, that Lot 1 consisted of a mansion-house, pleasure grounds, kitchen garden, orchard, park, and pastures, and admeasuring together seventy-nine acres, thirty perches, and contained a description of the tenure of this lot as follows:—"The whole is freehold, except about eight acres, which is copyhold of the manor of Clewer, [*but undistinguished, except as to not including any of the buildings*], subject to annual quit rents of 3*s.* 4*d.*" The clause within brackets was not in the original particulars, but was inserted upon the treaty for the purchase by the defendant.

Lot 2 was described as situate at the south-east side of Lot 1, and as consisting of 17*A.* 13*P.*

By the conditions of sale referred to, it was stipulated by the 3rd clause, that the purchase should be completed by the 25th of December, 1847; but that, if from any cause whatever the purchase should not be then completed, the purchaser should pay interest at the rate of 4*l.* 10*s.* per cent., until the completion of the purchase; and by the 8th clause it was provided, that the copyhold portion was to be sold, subject to the rents, heriots, fines, and customs of the manor; and that the purchaser was not to require evidence of the title of the lord of the manor.

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By the 4th of the conditions it was further stipulated, that if any mistake or error should have been made in the description of the property comprised in the particulars, such mistake or error should not annul the sale; but a compensation should be given or taken as the case might require, the amount thereof to be settled by arbitration of two indifferent persons, or their umpire; but that no compensation should be made for any deficiency in quantity under two acres; and that the vendors should not be required to account for any variation below the statement of the quantities as contained in the title deeds and the actual admeasurements thereof; but that the quantities stated in the particulars should be taken as correct. The last condition contained the usual stipulation for the forfeiture of the deposit, and liberty to the vendors to resell, in case of default by the purchaser.

The abstract of the plaintiffs' title was delivered in due time to the defendant's solicitors, and was submitted to counsel on his behalf. The abstract was returned to the plaintiffs' solicitors with twenty-eight requisitions; of these, the 16th was as follows: "The abstract does not shew or attempt any connection between the parcels in the deeds abstracted and those set forth in the printed particulars of sale. The vendors have therefore to establish the identity of the lands proposed to be sold with those known under the denomination mentioned in the abstract. This is especially important." On the 7th of December, 1847, answers to some of the requisitions were sent, with a promise to send an answer to the 16th requisition; but such answer not having been sent, the defendant's solicitors, in referring to the requisitions, in January, 1848, notified to the plaintiffs' solicitors, that the 16th requisition was important, and must be strictly complied with. The plaintiffs' solicitors did not attempt to satisfy the 16th requisition until the 17th of March, 1848; when a statement was made, and a tracing from the map of the

steward of the manor of Clewer, made in 1711, was furnished, tending to shew the probability that the site of the mansion-house and buildings was comprised in the freehold title; a copy of a map, made in 1755, was also furnished with the same object.

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The defendant's solicitors were dissatisfied with the evidence furnished in compliance with the 16th requisition. In consequence of the deterioration of the property from its remaining vacant, the solicitors for the plaintiffs and defendant came to an agreement on the 26th of April, 1848, of which the material parts are as follows:—"St. Leonard's Estate. Memorandum to be annexed to the conditions of sale. It is agreed on behalf of the vendors and purchaser:—1st That immediate possession of the within-mentioned estate may be taken by Sir Theodore Brinckman, Bart., upon the following understanding. 2nd. That the title be accepted, subject to the documents mentioned in the annexed list being furnished, and the requisitions therein being complied with, Messrs. Lacy & Co. (the plaintiffs' solicitors) hereby personally undertaking to furnish those documents and comply with those requisitions. 5th. That 7000*l.*, part of the purchase-money, be allowed to remain on mortgage at 4½ per cent. for a term of — years; and that the mortgage and conveyance be completed on the 6th of May next. 6th. The usual searches to be made on both sides, and any incumbrances to be disclosed by such searches to be discharged." The list referred to in the above agreement consisted of an enumeration of documents to be furnished, and requisitions to be complied with, sixteen in number, of which the material requisitions were the following:—

"No. 11, declaration of identity of lands mentioned in deeds to those now sold."

"No. 16, declaration of identity before alluded to, should shew that the road across the Crown allotment, and through

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Lord Harcourt's park, is the same road as existed in 1776, as mentioned in the Duke of Gloucester's Act."

The defendant took possession immediately after the above supplementary agreement had been come to, and the plaintiffs proceeded to procure the evidence remaining to be produced under the agreement. They prepared drafts of a declaration by Secker and another, two old persons, identifying the property comprised in the two lots, and sent it to the defendant's solicitors. The draft was slightly altered, and approved by the defendant's counsel, and was returned by the defendant's solicitors to the plaintiffs' solicitors on the 2nd of May, 1848, for engrossment.

The declaration was subsequently engrossed by the plaintiffs' solicitors, and made by Secker and the other declarant.

The draft conveyance of the property was delivered to the plaintiffs' solicitors by the defendant's solicitors on the 5th of May, 1848, and the same was returned to them approved on the 15th of May; but, in the interval, the defendant's solicitors gave notice to the plaintiffs' solicitors that the balance of the defendant's purchase-money was ready and unproductive, in order to stop the liability to pay interest from that day.

On the 25th of May, Mr. Charlton, one of the plaintiffs' solicitors, had an interview with Mr. Baxter, one of the defendant's solicitors, in which Mr. Baxter expressed a suspicion that the mansion stood on copyhold land, and requested further information on the subject; but Mr. Charlton objected, that the request was too late. In pursuance of a suggestion by Mr. Charlton, the defendant's solicitors, on the same day, wrote to the plaintiffs' solicitors, that it appeared to them that the documents furnished raised great doubts whether the site of the mansion was not copyhold, and desiring that the doubt might be cleared up.

The plaintiffs' solicitors immediately replied, that they considered the demand came too late.

The present steward of the manor of Clewer having been thereupon applied to on behalf of the defendant, claimed certain closes of land specified in the old map of 1711 as being parcel of the manor of Clewer; and a surveyor, employed by the defendant, compared the plan of 1711 with the map of the property which accompanied the particulars thereof upon the present sale, and it thereby appeared, and the defendant was advised, that the mansion-house and buildings, or parts thereof, were comprised in the closes of land which the present steward claimed as parcel of the manor. The defendant thereupon refused to complete.

The vendors instituted the present suit, which now came on for hearing.

Mr. *Malins* and Mr. *Borton* for the plaintiffs.—The original agreement, under which the defendant contracted to purchase, must be taken as being superseded as to the title to be furnished by the agreement of the 26th of April, 1846, which waived all previous objections of any substance, except as to certain points; and of these the 11th requisition, which provided for a declaration of identity of the lands mentioned in the deeds with those now sold, alone remains in question. The meaning of this clause must be ascertained by a reference to the 16th requisition made in 1847, from which it is evident that the identity referred to was an identity of parcels, and not a deduction of title distinguishing each parcel as being either freehold or copyhold. The statutory declaration, which was prepared for the purpose of proving this identity, having been submitted by the plaintiffs' solicitors to the defendant's solicitors, and having been altered by his counsel and returned with his express approval, must be taken to have been accepted as a full compliance with

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the requisition No. 11. Not only was the defendant satisfied with the declaration, but his solicitors prepared the draft conveyance of the property, and submitted it to the plaintiffs' solicitors, who approved of it. This having been done without any reservation of right by the purchaser, must be taken as precluding him from objecting for any defect of proof of identity, and the plaintiffs are entitled to have the contract specifically performed without furnishing any further evidence of identity.

Mr. *Wigram* and Mr. *Craig* for the defendant.—Of this purchase the mansion is the substance; and the defendant, the purchaser, has throughout shewn that he meant to purchase a residence of freehold and not of copyhold tenure. His case now is, that he cannot have what he stipulated to purchase, for the plan of 1711, corresponding as it does with the present plan, shews that the mansion-house is built on copyhold land. The 11th requisition of the agreement of April, 1848, has no reference to the 16th of the original requisitions of 1847, but refers to the clause in the particulars guaranteeing to the purchaser that the site of the mansion was not copyhold. Under these circumstances, on the authority of *Warren v. Richardson* (a), *Crompton v. Lord Melbourne* (b), and *Blachford v. Kirkpatrick* (c), the purchaser is entitled either to reject the contract or to complete with compensation, at his option; and he has exercised that option, and declined to complete. [The *Vice-Chancellor* inquired, as neither fraud nor unfairness on the part of the vendors was imputed, why the question had not been referred under the 11th condition.] It was for the vendors to have suggested that course to the defendant before they filed their bill. The plaintiffs' bill makes no suggestion or proposal of any reference of the question under the condition. The defend-

(a) 1 Younge, 1.

(b) 5 Sim. 353.

(c) 6 Beav. 232.

ant seeks no such reference. He stipulated that the mansion should be freehold. The inconveniences of copyhold tenure, especially as to buildings, are serious; and, although compensation for the difference in value between copyhold and freehold tenures in land may be computed, the case is very different as to a villa residence. The 11th condition of the agreement of 1848 is not applicable to a case where the principal part of the purchased property is of a tenure different from what it is stipulated to be: *Flight v. Booth* (a), *Dobel v. Hutchinson* (b), *Powell v. Double* (c). [The Vice-Chancellor referred to *Stewart v. Allison* (d)].

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Mr. *Malins* in reply.—The rights of the purchaser under the agreement of 1847, as to the evidence of the plaintiffs' title, were disposed of by the agreement of April, 1848; and the defendant, by entering into possession, precluded himself from requiring any evidence beyond what was provided for by that agreement: *Burnell v. Brown* (e). The cases cited for the defendant do not controvert this position. In *Warren v. Richardson*, the purchase was of a leasehold interest, part of a larger property, demised by one lease to several lessees, and the objection to completion went to the entire title: it was, that it was in the power of any one of three strangers to destroy the entire estate agreed to be purchased.

His Honor reserved his judgment.

The VICE-CHANCELLOR:—

In this case, the dispute between the parties has reference mainly, if not solely, to the tenure of the buildings, forming a portion of the estate, partly freehold and partly

March 30th,

(a) 1 Bing. N. C. 370.

(d) 1 Mer. 26.

(b) 3 A. & E. 355.

(e) 1 J. & W. 168.

(c) MS. Sug. V. & P. 30.

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copyhold, agreed to be purchased from the plaintiffs by the defendant; and it must, I think, be taken, that under the original contract, that of September, 1847, considered independently of the second agreement, that of April, 1848, it was a condition essential to the goodness of the title, that the plaintiffs should furnish, and they were bound to furnish, to the defendant sufficient evidence of the freehold tenure of these buildings.

The plaintiffs assert that the evidence was furnished; but that, if it was not, the defendant is, by the agreement of April, precluded from taking the objection, that is to say, precluded, even if the buildings are copyhold, as well from rejecting the purchase on that ground, as from claiming compensation in respect of it. The defendant denies each of these propositions. Now, assuming for the present, that sufficient evidence of the tenure of the buildings to shew them freehold was not furnished to the defendant previously to the agreement of April, it may still not impossibly have been, that those who acted for the defendant in the matter, did not think so, or were content with the quantity and quality of the evidence; for it is, I think, if not certain, at least reasonably arguable, that by some or one of the documents, comprised in one at least of the abstracts delivered to the purchaser's solicitor, in the Autumn of 1847, some evidence of the freehold tenure of the buildings was afforded. I do not at present pronounce any opinion of my own, whether sufficient evidence in this respect was afforded before the agreement of April.

The question, however, whether the plaintiffs are right in their view of the effect of that agreement, must depend, I suppose, on the terms of its 2nd clause, and the 11th and 16th requisitions. [His Honor here read the clause, and the 11th and 16th requisitions.]

Now, if these two, the 11th and last requisitions, had not existed, I must consider it as clear that the 2nd clause would have supported the plaintiffs' view of the

force of the April agreement. Is then the 11th or the last requisition opposed to that view? If this question could be decided by the impression which, from the opinion written at the foot of the draft of the declaration of Mr. Secker and another, prepared after the agreement of April, I collect to have been upon the mind of the defendant's conveyancer, or by the acts and conduct (appearing by the evidence) of the parties' respective solicitors, from the time of entering into the April agreement to the latter part of the following month—it must, I think, be of necessity decided against the defendant. But, possibly, such a dispute ought not to be decided on such a ground; and I assume that it ought not. Still, I think it impossible to interpret the 11th requisition in the manner suggested on his part. It appears to me, that it purports to demand only the identification of the property, whether freehold or copyhold or both, which the particulars of sale had described, with the property, whether freehold or copyhold or both, to which the abstracts profess to shew a title in the plaintiffs, not the distinguishing of any part as freehold, or of any part as copyhold, a view of its construction not in my opinion removed or weakened or opposed by the last requisition.

If I am thus far correct, the defendant must, I conceive, by the agreement of April be taken to have accepted the title, so far as any question of freehold or copyhold tenure was concerned, that is, either to have admitted that he then had evidence sufficiently shewing that the buildings were freehold, or to have waived any further investigation of the point.

This agreement, of which the plaintiffs claim the benefit, having been for valuable consideration upon both sides, it lies, I apprehend, on the defendant to make a case for relief against the terms of it, or for an exemption total or partial from them. He might have done so by alleging and establishing fraud or unfair conduct on the part of

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the plaintiffs; but neither fraud nor unfair conduct is established or alleged, and probably could not have been with truth alleged against them. To bring into doubt the accuracy of the assertion that the buildings were and are freehold, is not, I apprehend, sufficient. Originally, the defendant had a right to require proof of the fact; but I think, as I have said, that he either had the proof or waived the right.

Again, had the defendant's case been, that by accident, through forgetfulness or through inattention, the provision in the particulars of sale as to the tenure of the buildings had been overlooked by his conveyancer or solicitor at the time when the agreement of April was made, he might possibly have been entitled to relief or exemption from the effect of the accident or forgetfulness or inattention, but the defendant's case is not so. His answer has the paragraph which I proceed to read, "Saith, that the 11th particular mentioned in such list of documents or requisitions, namely, declaration of identity of lands mentioned in the deeds to those now sold, had reference to the state of communications then pending, as hereinbefore mentioned, between the solicitors of the said complainants and the solicitors of the said defendant with respect to the identity of the said property, and to the assurance of the said solicitors of the said complainants, that they should have no difficulty in establishing the identity of such property by declarations of old people residing in the neighbourhood; and it had also reference to a particular kind of identity which the said particulars and conditions of sale bound the said complainants to establish, namely to shew that the copyhold part of the said Lot 1 consisted of some part or parts of that lot other than the site or sites of buildings."

Now, as to this, it is impossible not to observe that Mr. Charlton, in his deposition in answer to the 4th Interrogatory, speaks thus, "On the 25th of May, 1848, I had an in-

interview with the said Mr. Robert Baxter, one of the solicitors of the said defendant, as to a question which had arisen on the draft conveyance of the lands and premises in the pleadings in this cause mentioned; and having disposed of the said question, the said Mr. Robert Baxter told me that he was suspicious that the mansion stood on copyhold land, and expressed a wish to have some further information on the subject; but I reminded him that the title had been accepted, and that it was then too late to open that question. This was the first occasion on which such objection to the title to the said hereditaments and premises was taken by the said Robert Baxter or any other person." And in the same deposition, after stating some further conversation, Mr. Charlton says, "I suggested to the said Robert Baxter that he had better communicate with me on the subject in writing, which he promised to do." The 25th of May is the date, I need not say, of a letter from Mr. Baxter, which is in evidence.

Next, having already stated that, in my judgment, the language of the 11th requisition does not extend to the matter of the tenure of the buildings, I must, in addition, say, that the opinion of the counsel for the defendant, of the 2nd of May, being before the Court, and Mr. Baxter being one of the defendant's witnesses, it may be, consistently with every portion of the evidence in the cause, believed not only that the solicitors on each side intended the 11th requisition to bear the sense and meaning which I ascribe to it, but also that between the delivery of the abstract to the defendant's solicitor and the making of the agreement of the following April, they and the defendant's counsel had attended specifically to the provision as to the tenure of the buildings, and had formed an opinion that the abstracted documents afforded sufficient evidence of the buildings being freehold. Mr. Taylor's mission of the 24th of May was possibly well intended. It may or may not have had reasonably the effect of creating or strengthening in the

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mind of Mr. Baxter a belief or doubt that the buildings were copyhold, or not wholly freehold. It may or may not have had the effect of damaging the property, by bringing down upon it a claim which, whether well or ill-founded, would probably otherwise have not been made. However these things may be, I am of opinion that the letter and spirit of the agreement of April, and the manner in which all the persons who have been engaged in the matter have conducted themselves, render it impossible, without doing injustice to the plaintiffs, to say, that, on the ground of the buildings being wholly or in part copyhold, (if, in truth, they are so, of which certainly I am not convinced,) the defendant can relinquish the purchase, or claim compensation. I must, therefore, decree a specific performance of the agreement of September, 1847, subject to the agreement of April, 1848; and, declaring the parties bound by the latter agreement, declare also that, according to the true construction of the 11th requisition, forming part of it, that requisition does not demand or extend to the distinguishing of the freehold hereditaments comprised in the former agreement, or any part of them, from the copyhold hereditaments comprised in it; or any part of them. And it must, I suppose, be referred to the Master to inquire whether, on the footing of the two agreements, a good title can be made, when first it was shewn, and whether the requisitions forming part of the second agreement have been wholly, or to what extent, complied with (a).

(a) This decision was affirmed on appeal. See 3 Mac. & G. 53.

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GUDE v. WORTHINGTON.

April 19th.

CHARLOTTE HOWARD by her will, dated the 16th of March, 1815, after appointing William Henry Worthington her executor, made the following bequest: "I give and bequeath to my friend, William Henry Worthington, the sum of 1500*l.*, upon trust, to continue the same upon such securities as the same may be invested in at the time of my decease; or to call in the same and place it out again at interest on real or good securities, or in the public funds, and to apply the interest thereof to or for the benefit of the two daughters, and of Daniel the youngest son, of my nephew William Seaman, until their respective portions in the said 1500*l.* shall become payable, either in their maintenance or education, or otherwise, as the said William Henry Worthington shall, in his discretion, think fit; and when and as either of the said daughters of my said nephew William Seaman shall attain their respective ages of twenty-one years or be married, or the said Daniel Seaman shall attain the age of twenty-one years, then upon trust to pay to such daughter so attaining the age of twenty-one years or being married, and to the said Daniel Seaman so attaining his said age of twenty-one years, the sum of 500*l.* as her and his share of the money so given by me in trust as aforesaid; and in case either of such daughters shall die before she shall attain the age of twenty-one years or be married, or the said Daniel Seaman shall die before he shall attain his said age of twenty-one years, then I direct that the share or shares of him, her, or them so dying of and in the said trust money, shall from time to time accrue and belong to the survivors or survivor of such three children, and be divided equally amongst them, and be vested and payable to him, her, or them, at the time hereinbefore mentioned for payment of their original shares of 500*l.*: and I further direct, that all or every

A testatrix gave a fund to A. and B., who were her executors, in trust to place out the same at interest, and to apply the interest thereof, or the principal, for the benefit of Mary Ann S., in such way as they might, in their discretion, think fit, during her life, it being the wish of the testatrix that they should dispose of the principal and interest, or any part, or should withhold the whole and let the interest accumulate; and, upon the decease of Mary Ann S., in case the trust-fund, or any part thereof, or interest, should then remain undisposed of, upon trusts for other persons. A. and B. paid the interest of the trust fund and 100*l.*, part of the capital, to Mary Ann S., and died without any other exercise of their discretionary power:—*Held*, that Mary Ann S. was entitled to the whole of the trust funds.

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such accruing and surviving shares of and in the same trust monies shall be subject to the same chance and contingency of accruer, for the benefit of the survivors or survivor of such children, as is hereinbefore directed concerning their original shares of 500*l*."

The testatrix made a second codicil to her will, dated the 31st of October, 1816, whereby she appointed Samuel Boydell executor with William Henry Worthington; and, after reciting the bequest of 1500*l*., she proceeded thus:—"Now I do hereby revoke the said bequest of 1500*l*., and in lieu thereof, do hereby give and bequeath to the said William Henry Worthington and Samuel Boydell the sum of 500*l*., in trust, to place out the same at interest on such securities as they may think fit; and to pay and apply the interest thereof, or the principal, for the use and benefit of Mary Ann Seaman, the eldest daughter of my nephew William Seaman, in such way as they may in their discretion think fit, during the term of her natural life; it being my wish and desire, that they shall have the entire power over the same sum of 500*l*. to dispose of the principal and interest or any part thereof, or to withhold the whole and let the interest thereof accumulate, as my said trustees may in their discretion think fit, without being accountable to her the said Mary Ann Seaman, or to any other person whomsoever, for what they may think right to do respecting the same sum; and, upon the decease of the said Mary Ann Seaman, in case the said sum of 500*l*. or any part thereof, or any interest thereof, shall at that period remain undisposed of, upon trust, to add the same to the sum of 1000*l* hereinafter mentioned, to follow the trusts thereof: I give and bequeath to the said William Henry Worthington and Samuel Boydell the sum of 1000*l*., to be by them placed out at interest, and to be held in trust for Charlotte and Daniel, daughter and youngest son of my said nephew William Seaman, upon the same trusts, and subject to the same powers, and payable at the same periods, with benefit of survivorship between the two last-

mentioned children, as are mentioned, expressed, and declared in my said will respecting the sum of 1500*l.* thereby bequeathed for the benefit of the two daughters and Daniel the youngest son of my said nephew William Seaman, but which bequest of 1500*l.* is hereby revoked as aforesaid."

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The testatrix made a third codicil to her will, dated the 7th of January, 1818, by which, after reciting that she had effected a policy of 400*l.* on the life of her said nephew William Seaman, and also reciting the above stated bequest of 500*l.* for the benefit of Mary Ann Seaman by the second codicil to her will, she made the following disposition:—"Now I do hereby direct my said trustees, William Henry Worthington and Samuel Boydell, out of the interest, dividends, and annual proceeds of the said sum of 500*l.* so bequeathed to them, to pay and discharge the annual premium on the said policy as it arises during the life of the said William Seaman, and to receive the principal sum of 400*l.* when it becomes due on the decease of the said William Seaman, and to stand possessed thereof upon precisely the same trusts, intents, and purposes, as are mentioned, expressed, and declared, of and concerning the sum of 500*l.* so bequeathed to them as aforesaid."

The testatrix died before the year 1820, and her will and codicils were proved by both her executors in January, 1820.

Mary Ann Seaman married George Gude in 1828.

The executors set apart 500*l.* to answer the legacy to Mrs. Gude; and, after deducting the legacy duty, invested the same in their names in 690*l.* 7*s.* 11*d.* Consols, and out of the dividends paid the premiums on the policy, and paid the residue of the dividends to Mrs. Gude.

William Seaman died in 1842, and the executors received from the Insurance Office the 400*l.* assured and bonuses thereon, amounting altogether to 1280*l.*; out of the money thus received they advanced to Mrs. Gude 100*l.*

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on account of her legacy; and after payment of the legacy duty on the amount, they invested the remainder in 1069*l.* 18*s.* 1*d.* Consols, in their names, and thereupon the sum of 1760*l.* 6*s.* became vested in their names upon the trusts declared for the benefit of Mrs. Gude.

Samuel Boydell died in 1846, and William Henry Worthington died in 1847, having by his will appointed Edward Worthington and William Slater executors, who duly proved the same.

Charlotte Seaman married Mr. William Davis. Daniel Seaman died intestate.

Mr. and Mrs. Gude repeatedly applied to and importuned the executors to pay over the trust-fund of 1760*l.* 6*s.*, or a part thereof, to Mrs. Gude; but, beyond advancing the 100*l.* and paying the dividends to Mrs. Gude, they uniformly refused to comply with their requests.

Under these circumstances, Mrs. Mary Ann Gude, by her next friend, filed her bill against Messrs. Edward Worthington and William Slater, and Mr. George Gude her husband, and against her sister Charlotte and her husband Mr. W. Davis, and also against the administrator of Daniel Seaman, deceased.

The plaintiff by her bill stated the above circumstances, and alleged that the trustees had not in any manner exercised the discretion vested in them as to the disposal of the trust funds, and submitted that the discretionary power given by the will and codicils was personal to the said William Henry Worthington and Samuel Boydell, and was at an end; and she charged that the primary intent of the testatrix was to provide for the plaintiff; and that, in the events that had happened, the whole of the trust funds and dividends were under the trusts absolutely vested in her, subject to the marital right, if any, of the defendant George Gude. The bill set forth, that no settlement or agreement for any settlement had been made, that George Gude was unable to maintain her, and that he was

willing that the whole fund should be settled for her separate use. The bill prayed for a declaration that the plaintiff was absolutely entitled to the whole fund, or otherwise of the rights of the parties.

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Mr. *Russell* and Mr. *Smythe* for the plaintiff.

Mr. *Bagshawe* for Mr. George Gude.

Mr. *Bacon* and Mr. *Little*, for the trustees, submitted to act as the Court might determine.

Mr. *Freeling* for Mr. and Mrs. Davis and the administrator of Daniel Seaman, cited *Pink v. De Thuissey* (a), *Waller v. Waller* (b), *M'Donald v. Bryce* (c), and *Brown v. Higgs* (d); and submitted that the gift for the benefit of Mrs. Gude was conditional upon the exercise of a discretion by the executors of the testatrix; and no such discretion having ever been exercised, the trust failed, and the bequest over in favour of Mrs. Gude's sister and brother took effect (e).

The VICE-CHANCELLOR:—

I assume that the discretionary power given by the testatrix to her trustees has never been exercised as to the principal, at least beyond the 100*l.*; with regard to the rest at least, the discretionary power either has been waived or has been declined to be exercised. In either view the result is the same.

It should be declared, that the plaintiff, Mrs. Gude, is absolutely entitled to the whole fund; but there must be a reference to the Master to approve of a settlement.

(a) 2 Madd. 157.

(b) Id. 160.

(c) 2 Keen. 517.

(d) 8 Ves. 561.

(e) See also, on this point, *Walker v. Walker*, 5 Madd. 424; see, contra, *Beevor v. Partridge*, 11

Sim. 233; *Laing v. Laing*, 10 *Sim.* 315; *Gough v. Bult*, 16 *Sim.* 45; and *Burrough v. Philcox*, 5 *My. & Cr.* 72. That executors' discretion is not controllable, see *French v. Davidson*, 3 Madd. 396.

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STUTELY v. HARRISON.

The Court appointed a guardian ad litem to an infant defendant, without his production in Court, upon an affidavit that the infant was only nineteen days old, and a medical certificate that the infant could not be safely produced.

MR. GIFFORD moved, that a guardian ad litem might be appointed by the Court to certain infant defendants in the cause. One of these defendants had been born on the 31st of March last, and he could not safely be produced in Court for the purpose of such an appointment being made.

The VICE-CHANCELLOR said, that, upon an affidavit being produced, that the infant could not be brought into Court with safety, the Court would make the order in the absence of the infant defendant.

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DAVALL v. THE NEW RIVER COMPANY.

A testator, being possessed of a part of a share in the New River Company, by his will, executed so as to pass real estate, gave all his property to J. H., in trust for purposes and legacies the testator should make in any codicil. The testator, by a codicil not attested so as to affect real estates, gave several pecuniary legacies, and died without otherwise disposing of his property; the testator left no heir. Upon a question between the devisee of J. H. and the Crown:—*Held*, that New River shares were real estate for all purposes; and the Court declared that J. H. took the shares beneficially.

ELIZABETH HOLFORD, being seised or possessed of one-third part of one thirty-fifth part in the adventurers' moiety of the New River Company, by her will devised it effectually to Edward Harris and Richard Harris equally between them.

Upon the death of Edward Harris, letters of administration were granted in 1808 to Richard Harris as his lawful brother; and the dividends upon the whole were paid to Richard Harris.

Richard Harris, by his will, dated the 17th of October, 1822, and executed as then required to pass real estate, made the following devise: "I leave to John Hester, now residing with me, all my property, freehold, leasehold, or

Beale v Symonds 16 Beav. 414.

of any other description whatsoever, in trust, for purposes or legacies I shall make in any codicil I may add to this my last will."

The testator, on the 29th of November, 1823, made a codicil, which was not so acknowledged and attested as to pass real estate, and thereby gave several pecuniary legacies.

Richard Harris died shortly after the date of the codicil, without otherwise disposing of his property. John Hester proved the will and codicil of the testator in the Ecclesiastical Court; and in 1838 he claimed to have the entirety of the said third part of a share in the New River Company transferred into his name; but he did not prosecute such claim.

John Hester died in December, 1839, intestate, leaving Mary Davall, widow, his only sister and sole heiress at law and next of kin, him surviving; and letters of administration to his personal estate were shortly afterwards granted to her, and she claimed the entirety of the one-third part of the said share.

By an indenture, dated the 31st of December, 1845, Mary Davall conveyed and assured the said third part of the share in the New River Company, and the dividends then due and thereafter to become due in respect of the said part, unto and to the use of her daughter Julia Ann Davall, her heirs and assigns.

Julia Ann Davall filed her bill in 1845 against the New River Company and the *Attorney-General*, and prayed a declaration that she was entitled to the one-third part of the share in the Company, either beneficially or as trustee under the will; and that the Company might be ordered to insert her name in the books of the Company, as the proprietor; and for an account of the arrears of the dividends, and for payment thereof to her.

By an order made in the cause, in 1847, a preliminary inquiry was directed to be made by the Master, whether

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Richard Harris, the testator, died leaving any heir at law.

From evidence before the Master it appeared, that both Edward Harris and Richard Harris were illegitimate; and by his report, dated the 2nd of April, 1849, the Master found that Richard Harris left no heir at law.

The cause now came on for hearing.

Mr. *Swanston* and Mr. *Faber* for the plaintiff.—Shares in the New River Company are real estate: *Townsend v. Ash* (a). The will of Richard Harris devised the entire legal estate in the one-third part of a share which was vested in him to John Hester. The practical objects of the will are twofold: 1st. The devise of the share. 2nd That the devisee should do certain acts. The will has effected its primary object. The fee vested in the devisee. The obligation to do the acts which the testator intended to be done has not arisen. The plaintiff, whose title is under the devisee, claims that the fee thereupon vested absolutely in him. The Crown, on the contrary, contends, that there being no effectual disposition of the equitable interest by codicil, the devisee became a trustee for the heir of the testator; and that he, being illegitimate and having left no heir, became a trustee for the Crown. But this is not supported either on principle or by the authorities.

[The VICE-CHANCELLOR here suggested, that there might possibly be some doubt, whether the question of equitable title between the plaintiff and the Crown had come properly before the Court. The counsel for the plaintiff and for the Crown thereupon agreed to submit to the Court the equitable question between them.]

Mr. *Wray* for the Crown.—In *Burgess v. Wheate* (b),

(a) 3 Atk. 337.

Eden, 177; and see Co. Litt. 191 a.,

(b) 1 Blac. Rep. 123; S. C., 1

note by Butler.

there was a technical difficulty as to escheat, which does not arise here. This case is within the principle of the decision in *Middleton v. Spicer* (a). He also referred to *Taylor v. Haygarth* (b), and *Walker v. Denne* (c).

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Mr. *Wigram* and Mr. *Allnutt*, for the New River Company, submitted to act as the Court should direct.

The VICE-CHANCELLOR:—

Shares in the New River Company are real estate for all purposes; and I think, that, if Mr. Harris had left an heir, he would have been entitled beneficially.

I do not think that *Burgess v. Wheate* and the present case are substantially distinguishable, and I must decide accordingly.

There must be a declaration that John Hester took the part of the share beneficially.

(a) 1 Bro. C. C. 201. (b) 14 Sim. 8. (c) 2 Ves. jun. 185.



GROVE v. YOUNG.

April 19th.

THIS was a motion on behalf of the defendant, that he might be at liberty to examine Mr. John Stoneman de bene esse as a witness. The motion was supported by affidavits, which stated, that John Stoneman was a material witness on behalf of the defendant, and that he was the only witness who could depose to several important and material facts in the suit; but the affidavits did not spe-

Where it appeared upon affidavit that a material witness was going abroad, an order was made upon motion, that the defendant should be at liberty to examine him de bene esse;

and it was held not to be necessary that the affidavits should disclose the points to which it was proposed to examine the witness, or that he was the only witness who could give evidence on the points.

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cify the points on which his evidence was material. It also appeared, from the affidavits, that he was about to sail to the East Indies, and that his absence from this country would most probably extend over the hearing of the cause and the trial of any issue which might be directed by the Court.

Mr. *Beales* appeared in support of the motion.

Mr. *Rasch*, for the plaintiff, submitted that the defendant was not entitled to the order asked upon the affidavits in support of it. To entitle the defendant to the order asked, he should disclose the precise points to which it was intended to examine the witness: *Hope v. Hope* (a); he also referred to *Bown v. Child* (b), and *M'Kenna v. Everitt* (c); and it should appear upon the affidavits that Mr. Stoneman was the only witness who was able to give evidence on the points specified: *Pearson v. Ward* (d), *Rowe v. —* (e).

The VICE-CHANCELLOR said, he should have thought this only not a motion of course, because it required notice. It appeared that Stoneman was a material witness, and that he was going abroad.

The order was made; and the costs of the motion were directed to be costs in the cause.

(a) 3 Beav. 317.

(d) 1 Cox, 177.

(b) 3 Sim. 467.

(e) 13 Ves. 261.

(c) 2 Beav. 188.

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HAYWARD v. PURSSEY.

THIS was a suit instituted by James Hayward, Sarah Savill his wife, and three infant sons, who were legatees of one-third of the residuary estate of a testator named Samuel Godfrey, to set aside certain transfers of stock and underleases made and executed by the testator after the date of his will, in favour of Joseph Lush Coombs, Amy Sarah his wife, and the members of his family, who were, under the will, legatees of the other two-thirds of the residue. The plaintiff James Hayward, and the defendant Amy Sarah Coombs, were the children of the testator's first cousin James Hayward the elder, since deceased.

The bill alleged, that Mrs. Coombs and her husband, after their marriage, which took place in 1826, were allowed by Mr. Godfrey to occupy a house of his rent free; and that Mrs. Coombs acted as his housekeeper; that her husband had no property, nor did anything to earn a livelihood, but with his wife was wholly maintained by Mr. Godfrey; that they availed themselves of the opportunity afforded by their constant intercourse with him to obtain an undue influence over his mind to the prejudice of the plaintiff James Hayward; and that the unequal distribution of his property, made by his will, was owing to such influence; and that the will was prepared with their privacy, and concealed from the plaintiff James Hayward.

The bill farther stated, that, up to the year 1842, and during the early part of that year, the testator was, by all those who knew him, considered as a sensible and prudent man, and was perfectly competent to the management of his affairs; but that, towards the latter part of 1842, and prior to the month of December in that year, a change

*March 29th
& 30th.
April 23rd.*

The bill stated, that defendants, relations of a testator, had acquired influence over his mind, and had induced him to make by his will an improper and unequal distribution of his property among his relations, to the plaintiffs' prejudice. It then stated, that, after the execution of the will, the testator became of unsound mind, and, while in that state, made underleases and transfers of stock in favour of the same defendants, and by their procurement; and the bill prayed that these underleases and transfers might be set aside.

The defendants by their answer admitted, that, by their attention to the testator, they might possibly have acquired some influence over his mind; but they denied that they had ever used it to the prejudice of the plaintiffs.

Held, that, upon these pleadings, the plaintiffs could not impeach the underleases and transfers on the ground of their having been obtained by undue influence, no such issue being raised by the bill, and the allegation or the answer not having the effect of enlarging the issues for this purpose.

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was observed in his conduct and character, and that he gradually became childish and imbecile, and subject to strange delusions and aberrations of intellect; and that, towards the end of the month of December, 1842, he became completely of unsound mind, and incompetent to manage himself and his property, and so continued until the time of his death.

The bill further stated, that, in May, 1845, a commission of lunacy was issued to inquire into Mr. Godfrey's state of mind, on the petition of the plaintiff, Mr. Hayward; and that on the inquisition he was found to be of unsound mind, and to have been so from the 29th of April preceding.

The bill further stated, that in April, 1843, Mr. Godfrey's solicitor, by the instructions of the defendant Coombs, prepared four underleases of part of the testator's estate; and that the solicitor or the defendant Coombs presented them to him for signature; and that the same were executed by him in the said month of April, and whilst he was of unsound mind. The bill further alleged, that the underleases were made without any consideration; and that, although the leaseholds were of the annual value of 300*l.* and upwards, the rents reserved amounted to 87*l.* only; and that, at the time of the execution of the said four several indentures of lease by the said Saville Godfrey, he was unable, through mental imbecility, to comprehend the contents or the purport and effect of the same, and was incompetent to the management of himself and his affairs. The bill further alleged, that the defendant Coombs and his wife had procured Godfrey to sign several cheques, for sums amounting together to 966*l.* 13*s.* 9*d.*, in favour of his stockbroker, who, by their direction, invested the money in their names, and in the name of their son Savill James Coombs, in 1000*l.* 3*l.* per cent. Reduced Annuities; and that Savill Godfrey was, at the time of signing the cheques, of unsound mind and incompetent, as aforesaid; and that he

never gave any direction to the stockbroker as to the application of the said sums of money, and was not aware of the mode in which it was proposed to apply the proceeds of the said cheques.

The bill then stated in detail particular circumstances, as evidences of insanity, at the date of the transaction sought to be impeached; and prayed for the surrender to the executors of the premises comprised in the underleases, and that the 1000*l.* stock might be transferred to them.

The defendants, Coombs and his wife, by their answer said, that Mr. Godfrey, for eighteen years, resided with them; and that the defendant Mrs. Coombs was his only female relation, and had the entire management of his domestic establishment, and was, during the whole of that period, with the exception of the occasions when Mr. Godfrey went from home for the benefit of his health, in constant attendance upon him, and administered to his comforts in every possible way; and that the defendants, Mr. and Mrs. Coombs, upon all occasions, treated Mr. Godfrey with the utmost deference and affection, which he reciprocated towards them and their family. They further said, that, under these circumstances, it was probable, that they had some influence, but not an improper influence over him; and that such influence, if any, was never exerted in any way to the prejudice of the plaintiff James Hayward or his family; that the unequal distribution of the property of the said Savill Godfrey, made by his will, was owing principally to the circumstance of the plaintiff James Hayward having received from Mr. Godfrey sums of money far exceeding the amount ever received by the defendant Mrs. Coombs, and from a feeling of justice towards her, and in order to put Mrs. Coombs and the plaintiff James Hayward upon an equal footing.

Evidence was gone into on both sides.

Mr. Malins, Mr. H. Stevens, and Mr. Healey for the plain-

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tiffs.—The fair result of the evidence is, that the testator was of unsound mind at the date of the transactions. Even if this should not be considered as established, still a case of undue influence is made out; and as the defendants, Coombs and his wife, allege by the answer generally, that they have never used their influence to the prejudice of the plaintiff James Hayward, a case of undue influence is sufficiently put in issue.

Mr. Russell, *Mr. W. Rudall*, and *Mr. Hare* for the defendants.—The evidence relied on to prove insanity is self contradictory and incredible, and is, at all events, completely displaced by the concurrent testimony of Messrs. Gosling the bankers, the brokers, and the other men of business, in whose presence the transactions sought to be impeached took place, whose evidence must be considered as outweighing the exaggerated gossip and vague recollections of the servants and others who have been examined on behalf of the plaintiffs, as to particular acts and behaviour of *Mr. Godfrey* at other times. As to undue influence, it is only alleged by the pleadings with reference to the will, which is not, and cannot be, here impeached. The transactions in question are sought to be impeached by the bill on the ground of insanity only. The answer does not enlarge the issue raised by the bill, even if it could do so; for it must be read with reference to the interrogatory in the bill, which only applies to the testamentary distribution. Indeed the two cases are contradictory, for the plaintiffs cannot allege, that undue influence was exercised upon an intellect, the existence of which they at the same time deny.

Sir F. Simpkinton and *Mr. De Gex* appeared for the executors.

Mr. Malins, in reply, relied upon the above allegations in the bill as to the exercise of undue influence, and re-

ferred to *Attwood v.* — (a), *Taylor v. Tabrum* (b), *Watts v. Hyde* (c), as shewing that upon the allegations in the answer the plaintiffs might set up a case of undue influence.

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The VICE-CHANCELLOR:—

I have considered the pleadings and evidence in this case. The plaintiffs, as I understand, in consequence of a decree made in another suit, waived at the bar by their counsel all relief prayed by the present bill, except as to the four leases or underleases to Mr. Coombs, executed in 1843, and the sums of stock, amounting together to 1000*l.* 3*l.* per cent. Reduced Annuities, purchased in the months of January, February, April, and May, in that year, in the names of Mr. and Mrs. Coombs and their eldest son, thus restricting the suit now before the Court, practically, to the object of impeaching those transactions, and restoring or giving to the late Mr. Godfrey's personal estate the benefit of the four leases or underleases from the time when they were executed, and the benefit of the stock, as to part, from March, 1843, and as to the residue, from May in that year.

In this view of the case, it has plainly been necessary to ascertain what are the grounds on which, on the record, the plaintiffs in these respects profess to seek relief; that is, the case which, as to the leases or underleases, and the stock, the bill has brought to the defendants' attention, has called on them to meet and answer.

Having carefully read the bill, especially the passages that Mr. *Malins* in his reply particularly noticed, I have come to the conclusion that it must be treated as putting the plaintiffs' title to relief, in respect of the leases or underleases and the stock, solely and entirely on the ground of Mr. Godfrey's unsoundness of mind at the time of each

(a) 1 Russ. 353.

(b) 6 Sim. 281.

(c) 2 Coll. 368.

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of those transactions respectively—on the ground that, in the language of the record, he was then “completely of unsound mind and incompetent to manage himself and his property.” Upon the assumption, therefore, that at the time of either of the impeached transactions he was of sound mind, that transaction, I think, cannot, under this bill, be questioned, on the ground of undue influence or of influence improperly exercised, or confidence abused, or ignorance, error, defective information, or insufficient advice, if there was any undue influence, or any influence improperly exercised, or ignorance, error, defective information, insufficient advice, or abuse of confidence.

It was, however, contended for the plaintiffs, that, on principle or authority, or both, the form of the answers, or of one or more of them, ought to be deemed to have enlarged the issue or issues raised by the bill (supposing my construction of it correct), so as to enable the Court to give relief in respect of the impeached transactions, even upon the assumption that Mr. Godfrey was not of unsound mind at any time before the year 1844 or 1845, if the merits apparent upon the evidence shew the transactions to be inequitable. I have not, however, been able to convince myself, that this contention is well founded; and I cannot accede to the argument. It is not supported, I think, by principle, nor by the case of *Gordon v. Gordon*(a) or *Parsons v. Briddock* (b), nor by any one of the authorities that Mr. *Malins* mentioned (none of which do I question), nor by any other authority that I am aware of.

His Honor then proceeded to analyze and comment upon the evidence as to the soundness of Mr. Godfrey’s mind, and directed two issues to be tried: first, whether Savill Godfrey executed the four leases or underleases when of sound mind, so as to be sufficient for the government of himself and his property; and secondly, whether Savill Godfrey, when of

(a) 3 Swanst. 400.

(b) 2 Vern. 608.

sound mind, so as to be sufficient for the government of himself and his property, authorised or approved the purchase of the five parcels of stock, or any or either of them, in the joint names of Mr. and Mrs. Coombs and Savill James Coombs.

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The issues were tried, and a verdict found upon both of them in favour of the validity of the transactions in question.

The bill was thereupon dismissed, with costs to the extent of 400*l.*, to be paid by arrangement out of the plaintiffs' share of the residuary estate. The decree was made in the principal cause, and in a cause of *Coombs v. Brookes*, which had been instituted for the administration of the assets of the late Mr. Godfrey.

1850.
Jan. 29th.

LAMBERT v. NEWARK.

April 27th.

IN this case a fund had been carried to the credit of the cause, to an account called "The Account of Nutty Lambert and those entitled in remainder."

Nutty Lambert was, under the will (a) of the testator in the cause, entitled to the income of the fund for life. She had lately died; and a petition was now presented by a person entitled to one-ninth part of the fund expectant on Nutty Lambert's decease, for the transfer of that portion of the fund. All the facts had been found by the Master in a former stage of the cause, and the only question raised was, whether the persons entitled to the other

Where a fund bequeathed to one for life, with remainder to a class, (the members of which, as well as their shares, had been ascertained by the Master), had been carried to a separate account, the Court, on petition, presented after the death of the tenant for life, directed the transfer of one-ninth part of

the fund to the person who appeared on the report to be entitled thereto, without service of the petition on the persons entitled to the other eight-ninths.

(a) See *Hutchinson v. Townsend*, 2 Keen. 675; and *Lambert v. Hutchinson*, 1 Beav. 278.

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eight-ninths ought to have been served with the present petition, which had not been served on any one.

Mr. *W. Morris*, in support of the petition, referred to *Smith v. Snow* (a), *Hutchinson v. Townsend* (b), and *Lenghan v. Smith* (c).

The VICE-CHANCELLOR thought it unnecessary to serve the other persons entitled, the Master having found all the facts, and the state of the family. And his Honor made an order for the transfer of one-ninth of the fund.

(a) 3 Madd. 10.

(b) 2 Keen. 675.

(c) 2 Ph. 301.



April 25th &
 29th.

HEYWOOD v. GRAZEBROOK.

Where the assignor of a legacy put in a joint answer with other legatees, and her assignee a separate answer:—
Held, that this did not relieve the assigned fund from the assignee's costs; but that the benefit of the joinder of the assignor with the other legatees ought to go to the general estate.

THIS was a legatees' suit for the administration of a testator's estate. One of the legatees had assigned her share, upon certain trusts, for creditors. She put in a joint answer with other legatees. Her assignees under the deed answered separately. The question was, whether they were entitled to a separate set of costs, which they claimed on the ground that, as their assignor, who might have answered separately, had joined with other legatees, no extra costs had been incurred by reason of the assignment.

Mr. *Spence*, Mr. *Russell*, Mr. *Wigram*, Mr. *K. Parker*, Mr. *Wright*, Mr. *G. L. Russell*, Mr. *Osborne*, Mr. *W. Rudall*, Mr. *J. V. Prior*, Mr. *Gaselee*, and Mr. *Erskine*, appeared for the several parties.

The VICE-CHANCELLOR held, that the assignees must take their costs out of their share; and that the general estate ought to have the benefit of the joinder of the assignor with the other legatees.

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HARMER v. GOODING.

April 30th.

THIS was a demurrer for want of equity, and for want of parties.

The plaintiffs sued on behalf of themselves and all others the members of the Hackney Benefit Building Society (except the defendants). The defendants were the directors of the society, three of them being also the trustees, and one of them the treasurer.

The bill alleged that the society was established in August, 1845, for the purpose of raising (by monthly or other subscriptions of the several members, in shares not exceeding 120*l.* for each share, and such subscriptions not exceeding in the whole 10*s.* per month for each share,) a stock or fund for enabling each member to receive, out of the funds of the society, the amount or value of his or her share or shares therein, to erect or purchase one or more dwelling house or dwelling houses, or other real or leasehold estate, to be secured by way of mortgage to the society, until the amount or value of his or her shares should have been fully repaid, with interest thereon, and all fines and other payments incurred in respect thereof. That the society was in every respect a lawful society, and within the provisions of the Act of the 6 & 7 Will. 4, for the regulation of Benefit Building Societies.

That by the 14th rule it was provided, that as often as the funds of the society should amount to a share or sum of 120*l.*, the same should be respectively awarded to the highest bidder for the preference, and the purchaser should have the privilege of taking additional shares of 120*l.* as therein mentioned.

That the 22nd rule was thus expressed, "That any person who shall be desirous of withdrawing from this socie-

By the rules of a building society members were at liberty to withdraw on giving notice, and on certain terms as to the return of a portion of their subscriptions. A bill was filed by some members who had withdrawn, on behalf of themselves and the other members of the society (except the defendants), against the directors, charging them with fraud, and seeking an account of all the dealings and transactions of the society, and that the defendants might make good the losses arising from their fraud, breach of trust, wilful neglect, or default:—*Hold*, that the members who had not withdrawn, ought to be parties by representation or otherwise, and were not sufficiently represented by either the plaintiffs or the defendants. And the bill not alleging that their names were unknown

to the plaintiffs, a demurrer for want of parties was allowed.

The usual reference in a bill to a document itself, part of which alone is stated, does not entitle the plaintiff, on demurrer, to read the parts of the document which are not set out.

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ty any share or shares which shall not have been purchased according to article 14, shall be allowed to do so on giving one month's notice in writing of such his or her intention to the board for the time being, at any monthly meeting of the society, and the money subscribed in respect of any such share or shares shall be repaid to such member, subject only to the forfeitures next hereinafter mentioned."

The statement of the rules in the bill concluded thus—"as by such rules to which your orators crave leave to refer when the same shall be produced to this honourable Court, will appear."

The bill stated, that, on the 20th of August, 1845, the plaintiffs duly entered the society, and paid the entrance money on two shares, and thenceforth regularly paid their subscriptions; and that many other persons entered the society and paid their subscriptions; and that advances were made to the members according to the rules.

The bill further stated, that none of the shares of the plaintiffs had ever been purchased according to the 14th rule. That at a monthly meeting, held on the 29th of September, 1847, the plaintiffs and many other members gave the directors notice in writing, pursuant to the 22nd article; but that the defendants refused to pay the monies payable on those shares. That subsequently many other members gave similar notices.

That on the 1st of May, 1848, the directors sent a printed circular to the members, which stated that the directors did not feel it possible to return more than one-half of the amount subscribed, to be paid in rotation, according to the date of the notices of withdrawal; and that, when the society was wound up, any balance beyond the sum of 120*l.* per share, would be divided rateably among those who then withdrew, upon condition that any shareholder who had given notice to withdraw, might revoke such notice, and be reinstated as a shareholder, upon paying up his monthly instalments, with interest at the rate of 5*l.* per cent. per annum, but not subject to any fine.

The bill alleged that all the operations of the society had been suspended, although there had been no dissolution thereof; and it charged that the defendants had fraudulently, negligently, and improperly advanced funds of the society on grossly insufficient security, and had otherwise acted, as therein mentioned, fraudulently, negligently, and improperly, and in breach of their duty as trustees.

The bill also charged that the members of the society were more than 200 in number, and that their rights and liabilities were so subject to change and fluctuation by death and otherwise, that it was not possible, without the greatest inconvenience, to make them parties to the suit; and that, to do so, would render it impossible in fact to prosecute the suit to a hearing; and that all the members, except the defendants, had a common interest with the plaintiffs in the subject-matter of the suit, and in obtaining the relief thereby prayed. That the defendants alleged, that the members who had not given notice of withdrawal had not such common interest, and were necessary parties to this suit; whereas the plaintiffs charged that such last-mentioned members were more than 100 in number; and that, if the said last-mentioned members had not a common interest with the plaintiffs in the subject-matter of this suit (which the plaintiffs did not admit, but charged the contrary to be true), yet that such rights and interests as they had adversely to the plaintiffs were sufficiently represented by the defendants, none of whom had given notice of withdrawal.

The prayer was for an account of all the dealings and transactions of the society and of the directors and trustees; that the amount of all sums lost by their fraud, breach of trust, wilful neglect, or default might be ascertained; and that they might be declared liable to make good the same; and for a receiver, and an account of the debts and liabilities of the society; and that the property of the society might be applied in their payment.

No member who had not given notice of his intention to

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withdraw, was made a party, except the defendants, who were directors.

Mr. *Swanston* and Mr. *Beavan*, in support of the demurrer.—By the Building Societies Act (6 & 7 Will. 4, c. 32, s. 4) the provisions of the Friendly Societies Acts are incorporated with the former statute; and by one of these (10 Geo. 4, c. 56, s. 27) special tribunals are appointed for settling disputes, and thus the jurisdiction of the Court is excluded: *Crisp v. Bunbury* (a), *Rex v. Mildenhall Savings Bank* (b). Also the suit is defective for want of parties, the members who have not withdrawn not being represented on the record; for as misconduct is imputed to the directors, and it is sought to make them personally liable, they cannot be considered as representing innocent members: *Evans v. Stokes* (c), *Deeks v. Stanhope* (d), *Mazley v. Alston* (e), *Richardson v. Larpent* (f).

Mr. *Bacon* and Mr. *Southgate* in support of the bill.—First, the jurisdiction of the Court can only be ousted by express enactment, and is not taken away by the Act referred to: *Cutbill v. Kingdom* (g). Secondly, *Apperley v. Page* (h) shews that the suit is sufficiently constituted as to parties. [The *Vice-Chancellor*.—Was there not in the bill in that case an allegation, that the names of the absent persons were unknown?] The decision did not turn on that allegation. As this bill does not seek to wind up the society or distribute the funds, the absent parties are sufficiently represented for the purposes of the suit. They cited *Wallworth v. Holt* (i), *Cooper v. Webb* (k), *Richardson v. Hastings* (l), and *Attorney-General v. Wilson* (m).

In the course of the argument they referred to rules of the society not set out in the bill, and submitted that, as

(a) 8 Bing. 394.

(b) 6 A. & E. 952.

(c) 1 Keen. 24.

(d) 14 Sim. 57.

(e) 1 Ph. 798.

(f) 2 Y. & C. C. C. 507.

(g) 1 Exch. 494.

(h) 10 Jur. 998; 11 Id. 271.

(i) 4 My. & Cr. 619.

(k) 11 Jur. 443.

(l) 7 Beav. 301.

(m) Cr. & Ph. 1.

the bill contained the usual words of reference to the document itself, it must be considered part of the record. The *Vice-Chancellor* however held, that the Court could not, on demurrer, look at the rules which were not set out.

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12. Beav. 433
The VICE-CHANCELLOR:—

I am not sure that the bill is not demurrable for want of equity. I am not sure that, according to modern authorities, the bill is not so framed as to make it necessary for every shareholder to be made a party to it. I do not however decide either of these points.

Assuming the bill not to be demurrable for want of equity, and assuming it not to be a bill which would require all the shareholders to be brought before the Court, I still think it defective for want of parties. I think that neither the plaintiffs nor the defendants in effect represent that class of shareholders who have not given notice of their intention to withdraw, the bill containing no allegation that their names were unknown to the plaintiffs.

I allow the demurrer. But the plaintiffs may have liberty to amend, if they think it worth while to do so (a).

(a) The suit did not proceed further.

CONSTABLE v. BULL

April 30th.

JOHN CONSTABLE, by his will, dated 19th of February, 1846, bequeathed as follows:—"First, I direct that all my just debts, funeral and testamentary expenses, be paid out of my estate as soon as convenient after my decease. I give, devise, and bequeath unto my dear wife, Mary Ann Constable, all and every my estate and effects, goods, chattels, houses, lands, monies, securities for money, due or growing due, every matter and thing whatsoever, and

A testator directed his debts and funeral expenses to be paid, and gave to his wife all his estate, effects, goods, chattels, houses, lands, monies, securities for money, due or growing due, every matter

and thing whatsoever and wheresoever the same might be at the time of his decease, for her sole separate use and benefit; and he further directed, that, at her decease, whatever remained of his estate and effects should go to and be equally divided, share and share alike, among certain specified persons, or such of them as should then be living:—*Held*, that there was a substantial gift after the widow's death.

*In re Galden 19. M. 42. 55. B. & B. v. Potter 10 Cl. D. 73.
Henderson v. Cross 29 Beav. 218. in 2 Robinson's L. 13 Cl. D. 11.*

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wheresoever the same may be at the time of my decease, for her sole separate use and benefit. I further give, will, and direct, that, at the decease of my said wife, whatever remains of my said estate and effects shall go to and be equally divided, share and share alike, between the following persons hereinafter named, or so many of them as may be then living." After describing these persons, the testator appointed his wife sole executrix.

The testator died on the 17th of August, 1847.

At the time of his death, the testator was possessed of leasehold houses held for long terms of years, household furniture, cash, money in the funds, and debts due to him on mortgage and simple contract.

The widow died on the 5th of December, 1848, intestate. Administration was granted to her estate to John Bull, one of the defendants.

The widow had received the rents and profits of the leaseholds and had used the furniture.

The present suit was instituted by the administrator de bonis non of the original testator to have the trusts of the will performed; and the question was, whether, according to the true construction of the will, the widow became entitled absolutely to the property therein comprised, or whether, at her death, so much as then remained of the estate and effects of the testator was divisible among the persons designated by the will.

Mr. *Wigram* and Mr. *Kent*, for the plaintiff, cited *Duhamel v. Ardovin* (a), *Hands v. Hands* (b), *Surman v. Surman* (c), *Gibbs v. Tait* (d), *Doe v. Glover* (e); and contended, that the expression "what remains" meant the residue of the terms in the leaseholds; and that then it was clear that the widow only took a life interest.

Mr. *Craig*, Mr. *Bichner*, Mr. *Toller*, Mr. *Giffard*, Mr.

(a) 2 Ves. sen. 162.

(b) 1 T. R. 437.

(c) 5 Madd. 123.

(d) 8 Sim. 132.

(e) 1 C. B. 448.

Fisher, and *Mr. Chichester*, appeared for defendants in the same interest.

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Mr. Russell and *Mr. Metcalfe* for the representatives of the widow.—The will gives the widow an absolute interest. The disposition of whatever may be left, is too indefinite to have any operation: *Bull v. Kingston* (a), *Bland v. Bland* (b), *Malim v. Keighley* (c), *Pushman v. Filliter* (d), *Wilson v. Major* (e), *Attorney-General v. Hall* (f), *Bland v. Bland* (g), *Ross v. Ross* (h).

Mr. Wigram in reply.

The VICE-CHANCELLOR:—

The gift to the wife is universal in the first instance, and then follow the ulterior gifts, with the words, “whatever remains of.” The only question seems to be, whether these three words have the effect of preventing the gift to the widow from being construed as a gift of a life interest; for, without these words, the subsequent bequests would have the effect of so reducing the interest given to the widow. There are several meanings capable of being rationally attributed to these words, which would be inconsistent with the construction giving to the widow the power of disposing of the property; and as at present advised, I think that the other legatees have a substantial interest, and that such of them as survived the widow are entitled. This must be considered to be my opinion, unless I mention the case again this Term.

On the last day of Term his Honor said, that he remained of the opinion which he had given; and a decree was made directing class inquiries, and the usual administration accounts, and reserving further directions and costs.

(a) 1 Mer. 314.

(b) 2 Cox, 349, 349.

(c) 2 Ves. jun. 333.

(d) 3 Ves. 7.

(e) 11 Ves. 205.

(f) 1 J. & W. 158.

(g) 2 Cox, 355.

(h) 1 J. & W. 154.

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May 1st &
3rd.DAKIN v. THE LONDON AND NORTH WESTERN RAILWAY
COMPANY.

A Railway Company, under the powers of the Lands Clauses Consolidation Act, 1845, gave the usual notice of reference to a jury to assess the value of a portion of a house, shop, and out-buildings, which had been occupied together, coffee being roasted in the outbuildings and sold in the shop. They gave a bond to the lessee, her heirs, executors, administrators, and assigns, and paid into Court 600*l.*, the amount at which the value of the buildings taken by them had been estimated, under the provisions of the Act; they then proceeded to enter into possession, and to pull down the buildings.

The lessee filed her bill, to which neither the superior landlord nor her sub-lessee was a party, for an injunction to restrain the Company from continuing in possession of the buildings, on two grounds: First, that the buildings taken were part of a manufactory, and could not be taken without the rest; and, secondly, that the bond given was invalid by reason of its being conditioned for payment of the sum specified to the *heirs*, executors, administrators, or assigns of the lessee. On a motion for the injunction, the Court considered that there was a serious question to be tried at law, whether the whole proceedings of the Company had not been illegal; yet, as the only complaining party was not in the occupation of the premises, and was not liable to personal inconvenience pending the litigation at law, and as the Company, in any event, was entitled to take the property, forbore to grant an injunction, upon the Company paying into Court a further sum of 600*l.*, and undertaking to abide by such order as the Court might make as to proceeding before a jury under the notice they had given, and as to the possession of the buildings.

The Court may, upon a motion for an injunction, direct a case for the opinion of a Court of law, although it grants no injunction, but merely directs the motion to stand over, and although the defendant objects to any case being directed.

MESSRS. RYLAND & SON had been in possession, as lessees, of certain hereditaments, all of which had been held and occupied as one holding from 1825 until 1829. They consisted of a dwelling-house and shop, No. 28, High-street, Birmingham, and of detached buildings at the end of a yard which separated them from the house and shop. The yard was the property of the lessees' landlord, who had granted to them a right of way across it to and from the detached buildings. The only access to these detached buildings was from High-street, by a passage taken out of the house and shop in High-street and across the yard. Messrs. Ryland & Son used the detached buildings at the end of the yard as a manufactory of articles in wire, which they sold wholesale and retail; and they had used the house and shop in High-street for storing and selling the manufactured articles. In 1829, they assigned all the premises to Mr. Partridge, who carried on therein the business of a wholesale and retail tea dealer and grocer. He used the ground-floor, fronting the High-street, as a shop, and the buildings at the farthest extremity of the yard as a stable and warehouse for goods, and otherwise for the purposes of his business. Mr. Partridge sold all the premises in 1830, for the residue of the term therein, to

Messrs. Dakin & Co. for 3000*l*. They laid out large sums in altering the premises. They nearly rebuilt the premises at the furthest end of the yard, and erected a steam-engine and extensive machinery therein, for the purpose of roasting coffee by steam, and for manufacturing and grinding articles of grocery.

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Earl Howe, the owner in fee simple, on the surrender of the then current lease, by indenture, dated the 25th of July, 1835, demised the whole of the premises, by the description of "All that piece or parcel of land, with the messuage or dwelling-house erected and standing thereon, and now used as a grocer's shop, situate on the east side of High-street, Birmingham, assessed and numbered 28, now in the occupation of William Dakin and Arthur Dakin; and also all that detached gig-house, but not the rooms over it or the cellar under it; and also all those detached buildings consisting of a warehouse and stable," [which premises were delineated in a plan in the margin of the indenture of lease,] "together with full and free liberty of ingress, egress, and regress, to pass and repass through the other premises belonging to the said Earl," [meaning the yard between the house and shop in front and the detached buildings in the rear,] "to and from the said detached buildings; and also liberty to use the pump in the yard at the back of the messuage hereby demised" to Messrs. Dakin & Co., for forty-three years, at the yearly rent of 125*l*. In 1838, the whole term was assigned to William Dakin; and he alone carried on the business down to October, 1840, using part of the detached buildings at the end of the yard farthest from High-street, for roasting coffee by steam, and for grinding coffee and other purposes as a tea and coffee dealer and grocer. Mr. Dakin then granted an underlease of the whole premises to Mr. Phillpott for fourteen years from that date, at the rent of 425*l*, who subsequently continued in possession of the whole property.

By an Act of the 9 & 10 Vict., The London and North

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Western Railway Company were authorised to enter on and take for the purpose of making an extension of their railway into Birmingham, the stable, warehouse, and premises at the end of the yard farthest from High-street, being part of the premises comprised in the lease of 1837, and which were comprised in the parliamentary plan, and referred to in the book of reference, and therein stated to belong to Earl Howe, and to be occupied by William Phillpott under a lease from William Dakin. The Company gave Mr. Dakin the usual notice, in December, 1846, that they required to purchase part of the premises, being the "portion of the said premises farthest from High-street;" whereupon he informed them that he was ready to treat for the sale of the whole of his interest in the whole of the premises.

Mr. William Dakin died in May, 1848; and administration was granted to his widow Mrs. Elizabeth Dakin. The Company offered to purchase from her her estate in the portion of the premises farthest from High-street; but she refused to assent to any sale of a part only of the premises. The Company thereupon arranged separately with Earl Howe and Mr. Phillpott to erect a stable and warehouse similar to those at the further end of the yard, on lands nearly adjoining.

The Company and two sureties then executed a bond, dated the 14th of April, 1849, in the penal sum of 600*l.* unto Elizabeth Dakin, her certain attorney, *heirs*, executors, administrators, or assigns; and thereby, after several explanatory recitals, the bond was declared to be void, "if the said Company or their successors do and shall well and truly pay or cause to be paid to the said Elizabeth Dakin, her *heirs*, executors, or administrators, or do and shall deposit in the Bank of England for the benefit of the parties interested in the said piece of land, buildings, and hereditaments, such purchase or compensation money as should, in the manner provided in the Lands Clauses Consolidation Act, 1845, be determined to be payable by the Com-

pany in respect of the estate of Elizabeth Dakin in the hereditaments to be entered on by the Company, with interest at 5*l*. per cent., under the provisions of the Act," therein mentioned.

The Company gave to Mrs. Dakin the usual notice, requiring that the value of the buildings thus required might be assessed before a jury. The Company also served upon her an original of the above bond, and paid 600*l*. into Court to an account "Ex parte the Company, the account of Elizabeth Dakin." On the 16th of April, 1849, they took possession of that part of the detached premises at the end of the yard farthest from High-street, and began to pull down the same.

The notice was given, the bond was executed, and the possession was taken under the provisions of the Lands Clauses Consolidation Act, 1845, ss. 84 and 85.

Mrs. Dakin thereupon filed a bill against the Company, stating, among other things, the above circumstances, and charging, that "the part of the premises situate at the end of the yard farthest from High-street," had been used by Mr. Dakin up to October, 1838, as an important part of his occupation, without which he would not have been able to carry on his wholesale trade; and that there was no other ground or building included in the lease of the premises, on which a similar or any such erection could have been built or placed. The bill also charged, that the portion of the premises taken possession of by the Company was essential to the enjoyment of the premises and to the carrying on of the trade then carried on thereupon; and that without such portion it was impossible that such a trade as has been established on the premises could be conducted. The bill then submitted, that the Company had no power by law to take possession of and to compel the plaintiff to part with or sell the portion of the premises which they had taken possession of, alone and without the rest and remainder of the premises comprised

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in the lease; and it charged, that the bond was not in the form prescribed by law. The prayer was for a declaration by the Court, that the Company had no power by law as against the plaintiff to take possession of and enter upon the said premises at the end of the yard farthest from High-street, alone, and without purchasing the whole of the premises comprised in the lease, for the residue of the plaintiff's estate and interest therein; and that the 600*l.* paid into Court, as mentioned in the bond, had not been ascertained in a proper manner; and that the bond was not in a proper form; and that an injunction might issue to restrain the Company from keeping possession of, demolishing, or intermeddling with the portion of the premises they had entered on.

The cause now came on upon a motion for an injunction to restrain the Company from keeping possession of the portion of the premises on which they had entered.

Mr. *Malins* and Mr. *Glasse* in support of the motion.—The premises held under lease from Lord Howe constitute a property of such a character that the Company has no right to take the part of it which they want, leaving the remainder on the hands of the owner, and putting him to accept compensation, by reason of severance, under section 49 of the Lands Clauses Consolidation Act, 1845. For the whole property constitutes one manufactory, within the meaning of the 92nd section of the Lands Clauses Consolidation Act, 1845; and the Company had no right to take the buildings on which they have entered without taking the whole of the premises held therewith. The converting of coffee from the state of mere berry into roasted coffee, and by grinding fitting it for use, is a manufacture; and this is carried on in the buildings as an adjunct to the shop in which the coffee is sometimes ground, and sometimes only made up into parcels and sold. The distinction between unmanufactured tobacco in the leaf and cigars is recognised

by the excise laws, which impose a different duty on the one sort as unmanufactured, and on the other as manufactured. The same distinction, in truth, exists as to coffee, and spices and groceries generally. This case is similar to that of *Barker v. North Staffordshire Railway Company*(a), where this branch of the Court granted an injunction.

The bond is informal; it is made payable to the heirs of the plaintiff: *Poynder v. The Great Northern Railway Company* (b).

The power given by the Act is summary; its exercise must therefore be restrained within the exact terms of the Act: *Hoskins v. Phillips* (c).

Mr. Bacon and Mr. Speed for the Company.—In *Barker v. The North Staffordshire Railway Company*, the entire premises formed one manufactory, beyond all question, and the parts severed were essential to the enjoyment of the rest. Here the plaintiff does not put her case on the entire premises constituting one manufactory; but she says, that the buildings taken are essential to the enjoyment of the house and shop in High-street. The evidence does not shew such an enjoyment or use of the entire premises as brings them under the description of a manufactory. If there be an error in the bond, it is of a mere formal character, and cannot affect the remedies of the plaintiff; and the Court will not encourage an objection of such a kind, especially considering that the Company must, in any event, have the land they have taken under terms which will give the plaintiff ample compensation.

Mr. Malins in reply.—In an unreported case before Vice-Chancellor Wigram, a Railway Company took a small

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(a) 2 De G. & S. 55.

(b) 16 Sim. 3.

(c) 18 L. J., Exch., 1.

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building, situate at the end of the garden, used with a house, and the Court made the Company take the house and entire premises. He also cited *Reg. v. Walters* (a), *Rea v. Brown* (b); and referred to Sheppard's Touchstone, p. 94.

The VICE-CHANCELLOR:—

In my opinion, it is a serious question, whether at law the whole proceedings of the Company with respect to this property have not been illegal, and therefore such as ought not to have taken place.

Either party is entitled to take the opinion of a Court of law on this point. What ought to be done in the meantime? That is the only substantial question on this motion.

Whatever I may have thought in the particular circumstances of the case of *Barker v. The North Staffordshire Railway Company* (the brine-pit case), I consider here, that the fact, that the person complaining is not in the occupation of the property, and has not been and will not be personally inconvenienced by what is done, is not to be disregarded. In the next place, it is quite clear that the Company will, in any event, be entitled to have and must have the property sought to be protected by this motion. The dispute is, whether they are also bound to take additional property. If they are so bound, then all the proceedings that have taken place are bad; if they are not, still they must pay the full amount of damage done to the property which they are not bound to take, by reason of the severance of one part from the other.

Considering these circumstances, and considering also that the opinion of a Court of law may probably be obtained in Trinity Term, I think that it will be the better course to abstain from interfering by injunction, on the Company undertaking, without prejudice to any question, to

(a) 1 M. C. C. 13.

(b) 2 East, P. C., c. 15, s. 10.

pay a sum of 600*l.* into Court beyond the 600*l.* they have already brought in, and undertaking to act as the Court shall direct with respect to proceedings at law and before a jury under the existing notice, and also to deal with the possession of the property as the Court shall direct.

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Mr. *Bacon*, for the Company, agreed to give the undertaking.

On this undertaking the motion was refused.

Mr. *Malins* said, the plaintiff desired the opinion of a Court of law on the question. He submitted, that the same circumstances, as to the uncertainty of the Company being obliged to take all, existed in the case of *Barker v. The North Staffordshire Railway Company*.

The VICE-CHANCELLOR thought that case did not furnish a rule for the present. He there granted an injunction pending a trial; but he thought that providing a brine-pit for the supply of a salt manufactory was a different thing from hiring a stable and warehouse for a certain time, especially where the hirer would not be the plaintiff. Should the opinion of a Court of law be against the Company, they would probably have to deliver up possession of the property immediately.

The matter was spoken to on these days; on the latter of which, the defendants not consenting to an ejectment being tried, the Court directed a case for the opinion of a Court of law.

May 3rd
& 28th.

The minutes, as delivered out, expressed that the case was directed by consent. The defendants objected to this, and insisted, that they had given no consent, and that a case could not be directed on motion except by consent.

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Jan. 24th.

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The motion, having been placed in the paper (by leave), was on this day again spoken to upon the minutes of the order.

Mr. *Bacon* and Mr. *Speed* said, that they had been misapprehended as having consented to any part of the order. They, on the contrary, objected to any case being directed for the opinion of a Court of law; and submitted, that the plaintiff must be left to his ordinary legal remedy. They contended, that no precedent had been adduced of a case for the opinion of a Court of law having been directed on a motion, where the defendant objected to such a course; and that an order for a case could not, with propriety, be made on an interlocutory application before answer, if either party objected, because the parties had had no opportunity of regularly proving the facts on which the opinion of the Court of law ought to be taken, nor were they indeed at issue. That cases had been in general only directed where the Court thought the plaintiff entitled to an injunction; so that the direction of a case was for the defendant's benefit; whereas, here, the Court was of opinion that the plaintiff was not entitled to an injunction.

Mr. *Malins* and Mr. *Glasse* for the plaintiff.—It is immaterial to consider whether the defendants consented or not. The Court can make the order without any consent. In *Rigby v. Great Western Railway Company* (a), which was a motion for an injunction, Lord *Cottenham* said, "Where the interference of the Court depends upon a legal right, it is the duty of the Court itself to put the matter into a proper course, for the purpose of ascertaining that right. It ought not to be left to the option of the defendant." And his Lordship there directed a case, although he dissolved the injunction. It is the constant practice of the Registrars to draw up orders directing cases on inter-

locutory applications, without introducing any words expressive of consent: *Brocklebank v. Whitehaven Junction Railway Company* (a), and *Bishop of Exeter v. Hawkins* (b).

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Mr. *Bacon* submitted, that in none of the cases cited had the point been raised, or had the direction of a case been objected to.

The VICE-CHANCELLOR said, that all he required was a precedent of such an order; and that those referred to were sufficient.

The following was the form of the order:—

Whereas Mr. *Mahins* and Mr. *Glasse*, of counsel for the plaintiff, this day &c., and offered divers reasons unto this Court, that the said Company and their servants, agents, and workmen, might be restrained by the order and injunction of this Court from &c.—in the presence of Mr. *Bacon* and Mr. *Speed*, of counsel for The London and North Western Railway Company. Whereupon and upon hearing an affidavit &c. read, and what was alleged by the counsel for the plaintiff and for the defendants, and the defendants, The London and North Western Railway Company, by their counsel, undertaking, without prejudice to any question, to pay the sum of 600*l.* into the Bank to the credit of this cause, and to abide by such order, (if any), as this Court may make respecting any proceedings before a jury to settle the amount of compensation, and as to the possession of the premises in question: This Court doth order, that this application, except as after mentioned, do stand over until the further order of this Court; And

(a) 15 Sim. 632. As to an issue, see *Cory v. Farnmouth and Norwich Railway Company*, 3 Hare, 607.

(b) Rolls, 21st July, 1842; and see *Langley v. Snead*, and *Alcock v. Snead*, Reg. Lib. 1821, B. 97 and 491.

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it is ordered, that the defendants, The London and North Western Railway Company, do, on or before the 25th day of June next, or within ten days after service of this order, such service to be verified by affidavit, pay into the Bank with the privity of the Accountant-General of this Court, to the credit of this cause, the sum of 600*l.*, without prejudice to any question in this cause; And it is ordered, that a case be made for the opinion of the Barons of her Majesty's Court of Exchequer; And it is ordered, that the questions in such case be—

First, whether the bond given by the said Company was such a bond as is required by the Lands Clauses Consolidation Act, 1845.

Secondly, whether the act of the defendants in entering upon and pulling down the buildings of the plaintiff, in the plaintiff's bill mentioned, was a lawful act; and,

Thirdly, Whether the defendants are entitled to require the plaintiff to sell or convey to them the buildings which they have entered upon and used for the purposes of their Railway and works, as in the plaintiff's bill mentioned, without purchasing the plaintiff's dwelling-house and shop fronting to High-street, Birmingham, in the plaintiff's bill mentioned.

And it is ordered, that such case be settled by the Master of this Court in rotation, in case the parties differ about the same; and that all proper facts necessary to bring these matters in question be stated in the said case; and the said Barons are to be accordingly attended with the said case. And this Court doth reserve the consideration of all further directions until after the said Barons shall have made their certificate.

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SHERWOOD v. BEVERIDGE.
THRUPP v. BEVERIDGE.

May 4th &
28th.

THIS was the petition of a purchaser of three lots under a decree, to be discharged from his purchase.

Two of the lots had been purchased at a public sale, and the other by private contract. Both purchases were subject to similar conditions of sale; one of which was, that all objections should be delivered within ten days after the delivery of the abstract.

The report as to the purchase of Lots 1 and 2 was confirmed on the 18th of November, 1848; and the contract for the purchase of Lot 3 was approved by the Court, by an order dated the 3rd day of November, 1848.

The plaintiff's solicitor sent the abstracts of title to the petitioner's solicitor; and it was in one of these abstracts stated, that one Mr. John Jarvis, the survivor of certain persons nominated trustees by the will of the testator in the cause, had renounced the trusts of the will.

On the 9th of October, 1848, and within the time stipulated by the contracts, the petitioner's solicitor sent to the plaintiff's solicitor his objections and requisitions.

By one of these requisitions the purchaser required, as evidence of John Jarvis' having disclaimed, an abstract of the deed of disclaimer and its production.

By another of the requisitions, he required to be furnished with a list of the cestuis que trustent entitled to the purchase-money, and their concurrence in the conveyance.

In October, 1848, the plaintiff's solicitor informed the petitioner's solicitor, that the statement of Mr. Jarvis hav-

Defendants in a cause, where there has been a sale under a decree, ought to be served with the petition of a purchaser to be discharged from his purchase.

In September, 1848, a purchaser bought under a decree, and by his requisitions on the title required a receipt to be given by a trustee having power to give receipts, but who was by mistake stated in the pleadings to have disclaimed, and was not a party to the cause. Afterwards, the purchaser required that the trustee should be brought before the Court by supplemental bill. In the course of the discussions on these subjects, it was objected by the purchaser that an additional cestui que trust ought to have been brought before

the Court. The plaintiff acceded to this, and promised that the defects complained of should be supplied and remedied by a proper supplemental suit, and petition of rehearing, in which (as all parties were amicable) a decree might be obtained in three weeks. This took place in March, 1849. The purchaser, in answer to the proposal, declined waiting any longer, and demanded back his deposit and costs. He then presented a petition to be discharged from his purchase; but before the petition came on to be heard, the defects in the suit had been supplied:—*Held*, not a case for discharging the purchaser.

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ing disclaimed the trusts of the will, was a mistake, he having only renounced the executorship; and that he was willing to act as trustee, and would convey the estates to the purchaser.

Answers to the requisitions upon the whole title were then forwarded to the petitioner's solicitor; who, on the 30th of October, 1849, wrote to the plaintiff's solicitor as follows:—

"I have to acknowledge your favour of the 28th inst., inclosing answers to the requisitions on abstracts of title and copy affidavit of Mr. Clements.

"Abstract to part of Lot 2 and Lot 3.

"Your answer, subject to my being satisfied on further inspection of the stamps, will of course be satisfactory.

"I am very glad that our course will be so much easier by the consent of Mr. Jarvis to convey.

"I will by this evening's post give my agent, Mr. Crouch, 37, Southampton Buildings, Chancery-lane, instructions to attend to this matter for me; and with whom you will be pleased to make any necessary arrangements."

On the 13th of November, the petitioner's solicitor again wrote to the plaintiff's solicitor as follows:—

"I presume you will send me copy order confirming the sale of Lot 3, and which I should be glad to receive.

"In preparing the conveyance under the devise to Mr. Jarvis, it will be requisite for him to give a receipt for the purchase-money. As this is to be paid into Court, how do you intend that I shall shape the receipt, &c.? Without Mr. Jarvis' acknowledgment, I cannot have the benefit of the indemnity clauses under the will."

In reply to this letter, the plaintiff's solicitor stated, that he did not consider Mr. Jarvis' receipt for the purchase-money necessary; as by the order for sale it was directed to be paid into Court, to the credit of the first-mentioned

cause, and that he would have the receipt of the Accountant-General for it; nor would the benefit of the indemnity clauses under the testator's will be required, all parties, as the decree then stood, being before the Court, and consenting to the sale.

To this statement the petitioner's solicitor replied, so far as is material, as follows:—

“The only indemnity a purchaser has against the cestuis que trust is by obtaining, under Mr. Jarvis' hands, a receipt for his purchase-money. Unless the purchaser can be brought within the exoneration clause of the will, and which can only be done by Mr. Jarvis' receipt, he will be bound to see to the application of his purchase-money; and hence must require the concurrence of all the cestuis que trust under the will. The consideration by the conveyance may be made payable to Mr. Jarvis, being by his consent paid into Court, and he could give a receipt for the amount, as paid by his order and consent to the Accountant-General.

“The suit is only for a general administration of the testator's estate; and the fact of Mr. Jarvis now conveying will contradict one of the allegations of the bill; and most unquestionably, if it had been ascertained that Mr. Jarvis had not disclaimed, he would have been made a party to the suit, and then the sale would have been placed in a different position.

“I must request that you will arrange the above point with Messrs. Lewis, and let me know the result before I can accept the title or prepare any draft conveyance.”

Messrs. Lewis, mentioned in the above communication, were the solicitors of Mr. Jarvis. The plaintiff's solicitor, in answer to the last-mentioned letter, agreed to the suggestion contained in it as to the manner in which the receipt for the purchase-money should be framed; and requested the petitioner's solicitor to frame the receipt accordingly. Shortly afterwards, on the 27th of November,

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the petitioner's solicitor wrote to the plaintiff's solicitor as follows:—

"I have consulted my conveyancer and equity draftsman in this matter, who is decidedly of opinion, that, as this suit now stands, unless Mr. Jarvis actually received the purchase-money and will give an absolute receipt for it, which Messrs. Lewis decline, a good title cannot be made, nor a valid conveyance to my client. He considers you must bring Mr. Jarvis before the Court by a supplemental bill, and then, under proper directions, the Court may proceed on the present sales, and the difficulty now occasioned by Mr. Jarvis being no party to the suit may be surmounted. I saw Messrs. Lewis the other day thereon, who told me, that they should not allow their client to sign any document purporting to charge him with the purchase-money. I have explained the matter to my agent, and directed him to give any assistance to the accomplishment of the course which seems absolutely necessary."

After some further correspondence and discussion, the plaintiff's solicitor waited upon the petitioner's solicitor, with two cases which had been laid before counsel, and accompanied by Mr. Lewis (Mr. Jarvis's solicitor) who happened to be that day in town; and some conversation took place between the parties as to the frame of the receipt for the purchase money by Mr. Jarvis, when it was ultimately arranged, that the petitioner's solicitor should lay the papers before his counsel, with the opinions which had been taken, to see if he could frame the receipt in a manner that would meet the views of all parties.

On the 8th of February, 1849, the petitioner's solicitor sent to the plaintiff's solicitor a copy of the counsel's opinion, who had advised upon the title on behalf of the petitioner, to the effect, that the construction put upon the testator's will had been a wrong one, and that the

children of the testator's sisters (if any), born after the death of the testator and before the death of his widow, should have been parties to the suits.

On this opinion being laid before the plaintiff's counsel, they concurred in it, and advised that the original suit should be reheard, and the decree rectified; and that a supplemental bill, bringing the additional child (there was only one) and Mr. Jarvis before the Court, should be heard with it, which would enable the plaintiff to make a satisfactory title to the purchases.

The plaintiff's counsel thereupon laid the necessary instructions before counsel, to prepare the petition of rehearing and supplemental bill, and sent to the petitioner's solicitor copies of the opinions he had so as aforesaid taken, accompanied by a letter, from which the following is an extract:—"Fortunately, as it turns out, there was only one child of Mrs. Moore born after the death of the said testator and that of his wife, for whom I am concerned; I have laid instructions before counsel to prepare the supplemental bill and petition of rehearing, both of which I shall get this week. After which I shall get Mr. Jarvis and the other defendants to answer, and then get the decree rectified. As no opposition will be offered by any party, I hope to get this done within the next three weeks. You will be good enough, after you have perused the two opinions, to tell me whether you wish Mr. Jarvis to disclaim, or to act as trustee and convey, in obedience to the trusts of the will. As he is willing to act, it will be, I think, the better course to do so, to avoid the necessity of the concurrence of the cestuis que trustent in the conveyance, some of whom are abroad, and one in a distant part of India."

In reply to this communication, the petitioner's solicitor wrote, on the 26th March, 1849, to the plaintiff's solicitor as follows:—"In answer to your letter of the 22nd instant, I beg to state that I am advised not to embarrass the purchaser by approving or being a party to the pro-

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ceedings you propose to take. My client was a willing purchaser, and would have been glad to complete his purchase, if he could have had a good and marketable title; but after the great delay that has arisen, and considering the present aspect of the business, I cannot advise him to keep the matter open any longer. I, therefore, on the purchaser's behalf, request the return of the deposit and interest, and payment of his costs, an account of which I will send you forthwith."

On the 29th day of March, 1849, the supplemental bill was filed; and the plaintiff's solicitor thereupon wrote and sent to the petitioner's solicitor a letter to the following effect:—

"In reply to your letter of the 26th inst., I beg to inform you that your client has examined this title, which he has found both good and marketable; and it was upon his preparing his conveyance that a difficulty arose as to the manner of Mr. Jarvis (who was not a party to the suit) signing a receipt for the purchase-money. To get over this difficulty, instructions were laid by him before Mr. Cooke to settle the draft; when that gentleman raised an objection to the validity of the decree, in having been made in the absence of the issue of the testator's sisters, born after the death of the said testator and before that of the widow. This objection, as I am advised, is valid; and I have to-day filed a supplemental bill, bringing the child of Mrs. Moore before the Court, and also making Mr. Jarvis a party to the suit, in compliance with the previous request of your client. I have also obtained from counsel the petition to rehear the suit and rectify the decree, which, with the supplemental suit, will be heard on the first petition-day in Easter Term, being the earliest day on which I can get it heard; and when this is done, the title will be complete. I am advised by counsel, that, under these circumstances, I cannot return your client's deposit with interest and costs; but that, as soon as the cause is reheard,

I can enforce a completion of the purchase; which I shall proceed to do, in the event of your not taking the necessary step to complete it."

To this letter the petitioner's solicitor replied as follows on the 30th of March:—

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"In acknowledging your letter of yesterday, I have only to state, that I see no reason to alter my opinion; and my client will therefore abide by the resolution therein expressed. The contract must be considered as rescinded, and I shall act accordingly."

The petition of rehearing and the supplemental suit came on for hearing on the 27th of April, when the original decree was rectified, the sale of the testator's real estates was confirmed, and Mr. Jarvis was directed to convey them to the purchaser, in the event of the Master finding that the defendant Samuel Charles Moore was the only issue of the parties named in the testator's will born after the death of the testator and before the death of his widow.

The petition of rehearing and supplemental suit were set down for hearing on the 20th day of April last, being five days before the present petition of the purchaser to rescind the contract was presented.

Mr. *Swanston* and Mr. *J. A. Cooke* supported the petition.

Mr. *Russell* and Mr. *Fooks*, for the plaintiff, opposed it.

The VICE-CHANCELLOR inquired, whether any of the defendants had been served with the petition.

Mr. *Swanston* and Mr. *J. A. Cooke* said, they had not; and submitted, that it was only necessary to serve the plaintiff. They referred to 2 Daniell, Chancery Practice, 1153, 2nd edit.; and *Dalby v. Pullen* (a), Sugden on Vendors and Purchasers, p. 67, (11th edit.).

(a) 1 Russ. & My. 296, 305.

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The VICE-CHANCELLOR said, that, upon principle, he felt a difficulty in proceeding in the absence of the defendants, who had an interest in the purchase-money.

Mr. Colville, the Registrar, on being referred to, said, that the Lord Chancellor had in a recent case held, that it was not enough to serve the plaintiff.

The petition stood over for the practice to be inquired into.

May 28th. The petition now came on to be heard, the defendants having been served with it.

Mr. Swanston and Mr. J. A. Cooke, appeared for the petitioner.

Lechmere v. Brasier (a), *Dalby v. Pullen* (b), *Baker v. Sowter* (c), *Smith v. Nelson* (d), *Cutts v. Thodey* (e), *Tanner v. Smith* (f), *Blacklow v. Laws* (g), *Hobson v. Bell* (h), *Flower v. Hartopp* (i), and *Chamberlain v. Lee* (k) were cited.

Mr. Russell and Mr. Fooks appeared for the plaintiff.

Mr. F. J. Hall and Mr. Hoare for different defendants.

The VICE-CHANCELLOR thought, that the conduct of the purchaser had withdrawn the case from the influence of the principles on which *Lechmere v. Brasier* was decided; and that the purchaser ought not to be at present discharged, but was entitled to a reference as to title if he desired it.

The costs were reserved.

- (a) 2 J. & W. 289.
- (b) 1 R. & M. 296.
- (c) 10 Beav. 343.
- (d) 2 S. & S. 557.
- (e) 13 Sim. 206.

- (f) 10 Sim. 410.
- (g) 2 Hare, 40.
- (h) 2 Beav. 17.
- (i) 8 Beav. 199.
- (k) 10 Sim. 444.

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BLUNDELL v. STANLEY.

May 5th.

THIS was a suit for the specific performance of a contract for the purchase of land-tax, or rent charges in lieu of land-tax, which had been purchased or redeemed.

In 1799, Sir William Stanley, an infant, was, under the limitations of a settlement, tenant in tail male of lands in Cheshire, called in the pleadings the Puddington estates. On the 25th of March, 1799, his guardians contracted for the redemption of the land-tax upon these lands, under the provisions of the 38 Geo. 3, c. 60, for 8917*l.* 18*s.*, 3*d.* per cent. Consols, transferable by instalments.

The 17th section of this Act provided, that all persons claiming, on their own behalf or on behalf of others, the preference in the Act mentioned in purchasing the land-tax, may contract accordingly, and transfer stock in manner therein mentioned; and that, upon such transfer, and upon the registry or entry of the certificates, contracts, and receipts in the Act mentioned, with his Majesty's commissioners for the affairs of taxes, the manors, messuages, lands, tenements, and hereditaments, comprised in such contract, should thenceforth be wholly freed and exonerated from the land-tax charged thereon, and from all further assessments thereof, unless the person or persons, bodies, corporations, or companies, contracting for such land-tax, should, at the time of entering into the contract for the same, declare to the commissioners, with whom such contract should be entered into, his, her, or their option to be considered on the same footing as a person not interested in the said manors, messuages, lands, tenements, or hereditaments, purchasing the land-tax charged thereon, is by the Act considered; in which case, and upon such option and declaration so made being inserted in the contract, the person or persons, bodies, corporations, or companies,

Guardians of an infant tenant in tail redeemed the land-tax on the entailed estate. The tenant in tail died, having bequeathed the land-tax to the next tenant in tail. The latter tenant in tail suffered a recovery and settled the estate, but always dealt with the redeemed land-tax as a subsisting charge. The settlement contained in its operative part the usual general words—"all the estate" &c.:—*Held*, that the land-tax was not merged by its redemption, by the recovery, by the operation of the settlement, or otherwise, but passed by a bequest of it in the settlor's will.

Ware v. Polehill 5 Dely. Vol. 457. *Buckley v. Hoyle* 1 Hay Vol. 486.

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so contracting, his, her, or their executors, administrators, or assigns, were to be entitled and subject to such and the like benefits, advantages, conditions, and restrictions, as persons not interested as aforesaid would be entitled and subject to on their becoming the purchasers of such land-tax under the Act. The 37th section provides as follows:—That where any person or persons having such benefit of preference as hereinbefore mentioned, and who shall not be seised of or entitled to any estate of inheritance (a) in the manors, messuages, lands, tenements, and hereditaments, whereon any land-tax shall be charged, shall redeem such land-tax by and out of his, her, or their own estate, and shall, at the time of entering into the contract for the redemption thereof, have declared his, her, or their option to be considered on the footing of a purchaser or purchasers as aforesaid, such person or persons, his, her, or their executors, administrators, or assigns, shall have, hold, and enjoy the land-tax so redeemed by him, her, or them, as an annuity issuing out of such manors, messuages, lands, tenements, and hereditaments, (subject to such right and power of redemption thereof as hereinbefore is given to the person or persons beneficially entitled to the next estate or interest in reversion, remainder, or expectancy, as and when such estate or interest shall vest in possession); and when any such person or persons as aforesaid shall not, at the time of entering into the contract for the redemption of such land-tax, have declared his, her, or their option as aforesaid, whereby such manors, messuages, lands, tenements, or hereditaments, whereon the land-tax shall have been charged, will, by virtue of this Act, be exonerated therefrom, such manors, messuages, lands, tenements, or hereditaments, shall be and become chargeable for the benefit of such person or persons, his, her, or their execu-

(a) As to the meaning of this judgment in *Ware v. Polhill*, 11 expression, see Lord *Eldon's* Ves. 257.

tors, administrators, or assigns, with the amount of the 3*l*. per centum Bank Annuities, which shall have been transferred as the consideration for the redemption of the said land-tax, and with the payment of such yearly sum or sums of money, by way of interest thereon, as shall be equal to the amount of the land-tax redeemed.

The tenant in tail died without issue and an infant, of the age of nineteen, having bequeathed to his brother Sir Thomas Stanley, the next succeeding tenant in tail, all land-tax charged upon the testator's real estates, which had then lately been redeemed or purchased by his guardians and trustees, charged and chargeable with the same money, monies, or stock in the public funds, which his guardians and trustees had then contracted to pay or transfer for the same, to be paid or transferred to his executors, as to such part or instalment as his said guardians and trustees had already paid or transferred, or should have paid or transferred at his decease, within twelve months next after his decease; and as to the residue of such instalments at the times mentioned in the Act of Parliament, in trust for the testator's brothers and sister, Charles, James, Henry, and Catherine.

Sir Thomas Stanley was an infant when he succeeded to the estate; and the whole of the instalments contracted to be transferred for the redemption of the land-tax not having been transferred, his guardians (who were the same persons as had been the guardians of his late brother during his infancy,) transferred the remaining instalments. The whole of the monies applied in the purchase of the sums of stock so transferred, were so applied by the guardians out of the rents and profits of the Puddington estates.

In 1804, after all the instalments had been transferred, Sir Thomas Stanley attained twenty-one, and suffered a recovery of the Puddington estates.

By indentures of lease and release of the 11th & 12th of January, 1805, being the settlement made in contempla-

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tion of Sir Thomas Stanley's marriage, he settled a part of the Puddington estates; and the settlement contained, after the description of the parcels, the following common words:—

“Together with their rights, members, and appurtenances, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, both at law and in equity, of him the said Sir Thomas Stanley, of, in, and to the same.”

The limitations were to the use of Sir Thomas Stanley for life, with remainder to the use of his first and other sons in tail, with remainders over.

The settlement contained the usual covenants for title on the part of the settlor,—that the estates were free and clear of and from all and all manner of fines and other gifts, grants, sales, mortgages, judgments, estates, titles, charges, and incumbrances whatsoever, except certain leases, charges, and incumbrances therein particularly mentioned.

The exception did not refer to the redeemed land-tax, which was not mentioned in the settlement.

In 1817 Sir Thomas Stanley came to a settlement with his guardians in respect of the monies received by them in that character on account of the Puddington estates, and, in such settlement, credit was given to them for the amount of the instalments transferred by them for redemption of the land-tax in the lifetimes of both the tenants in tail.

Sir Thomas Stanley during his life received from the tenants of the Puddington estates, in addition to the rents, separate payments, equal in amount to the land-tax of the land in their respective holdings; which separate

payments were called land-tax. These payments were distinguished in the rentals from the amounts of the rents; and the leases granted after the date of the settlement contained covenants on the part of the tenants for payment of redeemed land-tax and all other taxes. All the charges in lieu of land-tax were paid to the tax-collector of the district, who paid or accounted for them to Sir Thomas Stanley.

There were other estates at Hooton, of which Sir William Stanley and Sir Thomas Stanley were successively tenants for life only. The land-tax upon them was redeemed, and afterwards dealt with in precisely the same way as that upon the Puddington estates. No question was raised as to the rent-charge in lieu of this land-tax, but the fact was referred to as affording an argument in the case.

Sir Thomas Stanley, by his will, dated 24th of July, 1841, devised certain hereditaments therein described (being the unsettled portions of the Puddington estates), and all land-tax, or rent-charges in lieu of land-tax, to which he was entitled, whether issuing out of the aforesaid land or lands at Hooton or elsewhere, to the use of his second son Rowland Errington Stanley for life, with remainders over. The will contained a power of sale of the devised Puddington estates, and of the rent-charges in lieu of land-tax; and the testator declared, that, if his eldest son should, within twelve months from the testator's death, signify in writing his desire to purchase the land-tax, or rent-charges in lieu of land-tax, charged on any lands of which the eldest son would be tenant in tail, at the price which the testator paid for the same, the trustees should, upon receiving such notice, sell the same to such eldest son accordingly, in manner therein mentioned.

After the testator's death, his eldest son Sir William Stanley, who thereupon became tenant in tail of the Hooton

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estate, and of the settled portion of the Puddington estates, gave notice to the trustees of his intention of exercising the option by purchasing the rent-charges in lieu of land-tax. He afterwards insisted, that, as regarded the settled portions of the Puddington estates, the devisees in trust could make no title, inasmuch as the land-tax, or rent-charge in lieu of the land-tax on those portions, was merged; and that, as tenant in tail, he was entitled to the benefit thereof, without any payment. The devisees in trust then instituted the present suit for the specific performance of the contract for purchase of the land-tax.

Mr. *Wigram* and Mr. *Riddell*, for the plaintiffs, relied upon *Ware v. Polhill* (a), and contended, that there had been no merger of the land-tax as to any part of the estates. They also relied upon the fact of the land-tax on the settled portion of the Puddington estates having been dealt with in the same way as that on the Hooton estate, which was not and could not be alleged to have merged.

Mr. *Bacon* and Mr. *Bates*, for the defendants, contended, that, either by the redemption of the land-tax without any option being declared, or by the recovery and the acquisition of the fee-simple by the late Sir Thomas Stanley, the land-tax was redeemed or merged; or that, at all events, it passed by the general words in the marriage settlement. They cited *Astley v. Mills* (b).

The VICE-CHANCELLOR said, that, in his opinion, it would be a wrong construction of the settlement, to say that it included the land-tax, if there had been no merger. And his Honor thought, upon all the circumstances of the case, that the land-tax had not been intended to be merged, and

(a) 11 Ves. 257.

(b) 1 Sim. 298.

was not merged; but he thought the question a fair one, and that there ought to be no costs on either side.

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The decree declared that the land-tax, or rent-charge in lieu of land-tax, charged on or payable out of the hereditaments comprised in the settlement of 1805 was not comprised in or affected by such settlement; and that the same was not merged or extinguished; and, the plaintiffs submitting to convey, the decree directed a conveyance and payment of the purchase-money, with interest. No costs on either side.

THE ATTORNEY-GENERAL v. THE LONDON AND SOUTH
WESTERN RAILWAY COMPANY.

May 8th.

THIS information, filed by the Attorney-General at the relation of two of the trustees of the turnpike road leading from Kingston-upon-Thames to Sheetbridge, near Petersfield, Hampshire, against the London and South Western Railway Company, prayed, that the Railway Company might be restrained from crossing, breaking up, cutting through, or in any way interfering with the turnpike road of the trustees, or the communication or the traffic thereon, until they should have caused to be made and appropriated for the use of the public a sufficient road over the proposed railway, as convenient for passengers and carriages as the

A Railway Company having begun to divert a turnpike road, by a crossing on a bridge over their railway with a sharp curve, an information, at the relation of two of the trustees of the road, was filed, praying for an injunction to restrain the Company from interfering with the road until they

should have provided another as convenient as the former, or as near thereto as circumstances allowed, as required by the Railways Clauses Consolidation Act, 1845, sect. 56.—The Court, holding that the Company were not doing as little damage as could be, granted the injunction, but without prejudice to any application either party might make to the Board of Trade, under the 66th section of the above Act.

In granting such an injunction, the Court cannot point out to the Company what they ought to do, except by stating the reasons which induce the Court to come to its conclusion, or the manner in which it appears to the Court that that which seems an evil can be remedied.

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then present turnpike road, or as nearly so as might be; and that, if necessary, the defendants might also be restrained from proceeding with a bridge in the information mentioned crossing the railway, and the approaches then in course of construction by them; and from carrying the turnpike road over the proposed railway by means of such bridge and approaches.

This was a motion for an injunction in the terms of the prayer of the information, which came on for argument before the defendants had put in their answer.

It appeared, that the Railway Company, the defendants, were constructing their railway between Guildford and Godalming, which crossed the Sheetbridge turnpike road at Peasemars, in a slight cutting of about one foot, six inches; and that the Company had begun to carry the road over the railway by means of a deviation and bridge at Peasemars; and that, at the place where the proposed railway was to cross the turnpike road, and for a very considerable distance on each side thereof, the turnpike road led across a flat, and in a straight line; and that there was no necessity, for the purpose of passing over the proposed railway, that the road should be diverted from the straight line, and that any such diversion would occasion considerable inconvenience to the public; but that the Company intended to divert the road from the straight line, carrying it from the then present line of road on the north side of the railway by a sharp curve up to the bridge, and, having crossed the bridge, to return into the then present line of road again by another sharp curve. The engineers and surveyors, on behalf of the information, deposed, that at a comparatively trifling extra cost, the Company could have carried the road over the railway by a bridge in its present line, by raising the road as it approached the bridge for some distance on either side; and that this was the only plan whereby the road could be made as nearly convenient as the circumstances allowed,

within the meaning of the Railways Clauses Consolidation Act, 1845.

It appeared, that, in a negotiation between the trustees of the turnpike road and the Railway Company, the former proposed, that, to lessen the curve, the Company should add a pier at each side of the bridge (which was then already erected) nearest the road, and purchase some of the land, which was common land, adjoining the road at each end of the bridge, still further to lessen the curve at the junction with the old road. The Railway Company refused to comply with this suggestion; but offered to refer the question to the Board of Trade. This was declined by the trustees of the road; and the Railway Company proceeded to make the crossing by a deviation and bridge with a sharp curve. It appeared that the turnpike road was used for considerable traffic between Guildford and Godalming, the tolls received at the two gates between these towns, a distance of four miles only, during the last year being 1150*l*.

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Mr. *Bacon* and Mr. *G. L. Russell*, in support of the motion for the injunction.—It is not denied, that the Railway Company has the power of crossing the turnpike road; but they must do it according to the provisions of the 46th, 50th, 53rd, and 56th sections of the Railways Clauses Consolidation Act, 1845. The 56th section of that Act contains the following enactment:—"If the road so interfered with can be restored, compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the Company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the Company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the for-

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mer road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods, after the first operation on the former road shall have been commenced, unless the trustees or parties having the management of the road to be restored, by writing under their hands, consent to an extension of the period, and in such case within such extended period;—(that is to say), if the road be a turnpike road, within six months; and if the road be not a turnpike road, within twelve months.”

The Company have not complied with the requisitions of this section. It has been proved, and must be manifest, that a road more convenient to the public than the line laid out can be formed. It is not necessary for this Court to point out to the Company how they may exercise their powers in the mode most convenient for the public. It is for them to act in that respect as they may be advised. But the authority of the Court in these cases has been well established, and it is essential to the public interests that the authority should be exercised: *Kemp v. The London and Brighton Railway Company (a)*. The Company, if they had completed their deviation in the plan proposed, not being the plan most convenient for the public, would be guilty of a misdemeanor: *Reg. v. Scott (b)*.

Mr. *Russell* and Mr. *Wickens* for the Company.—This information, being at the relation of the trustees of a turnpike road, ought not to be entertained. The Railways Clauses Consolidation Act, 1845, which imposes on Railway Companies the duties of crossing turnpike roads in a particular way, provides, by the 66th section, a special jurisdiction for deciding questions between trustees of roads and other persons having the duties of trus-

(a) 1 Railw. Cas. 495.

(b) 3 Id. 187.

tees to perform, and the Railway Company. The Company have been always ready to abide by the decision of the Board of Trade on the question between themselves and the trustees. If the jurisdiction of this Court is not entirely transferred to the Board of Trade as between the present parties, it is hoped that this Court will discourage an appeal to its jurisdiction where the legislature has supplied a tribunal with efficient means of deciding, by examination on the spot, between the parties, and will, in the exercise of its discretion, refuse the injunction. It is asked, upon this motion, that the injunction may be granted without any decision by the Court as to what are the limits of the powers of the Company. Lord *Cottenham* said that this was a very objectionable form of order, of which he had frequently expressed his disapprobation; and that a defendant ought to be informed as to what was the opinion of the Court on the limits of his rights, and ought not to be exposed to the consequences of violating an injunction expressed in vague terms: *Cotter v. The Midland Railway Company* (a). If, therefore, the Court should grant an injunction, it is asked, that the defendants may be informed what is the opinion of the Court on the limits of their powers in respect of making this new road.

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In the course of the argument, the counsel for the information proposed to submit to an arrangement for lengthening the access to the bridge over the railway, so as to lessen the curve on each side of the bridge to a specified extent. The Company, on the other hand, offered to make the approaches in such manner as any indifferent person of experience should direct; but neither of the proposals was acceded to.

The VICE-CHANCELLOR:

The Court is compelled (for the decision is forced upon

(a) 5 Railw. Cas. 187, 192.

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it) to come to the best conclusion in its power on the materials before it, as to the question, whether in their proposed works or work the Company, in the exercise of their powers, are doing as little damage as may be; or whether it can be said, that the road intended to be substituted for the road taken away is, in the language of the 56th section, "equally convenient as" the former road, or as near thereto as circumstances will allow.

The impression made by the evidence upon my mind is, that the Company are not doing as little damage as may be; and that the road which they propose to substitute is not as "convenient as" the former road, or as near thereto as circumstances allow. They are intending that which, in my view of the facts and of the law, is a wrong; and it is a wrong of a nature which I understand it to be the office of this Court to restrain.

It has been said, and perhaps justly, by Mr. *Bacon*, that all the Court can correctly decide, so far as it can be decided upon this motion, is, that what the Company are doing is what the Court thinks not right, whilst the Court cannot point out to the Company what they ought to do. I do not see how that is to be avoided, except by stating the reasons which induce the Court to come to its conclusion, or the manner in which it appears to the Court, that that which seems an evil can be remedied.

Now, the grounds upon which I proceed are, that the avowed plan of the Company makes a curve, or rather curves, upon the substituted road, inconveniently and unnecessarily sudden; that this suddenness might be removed and the curve or curves made easier, without any unreasonable or heavy expense, and without any extraordinary difficulty.

There appear to me two ways of avoiding the inconvenience, (judging as well as I can on the subject, upon which I am bound to form an opinion), either to increase the width of the surface at the ends of the approaches of the

bridges, in the manner suggested by the relators, with other works of a slight description accompanying it, which, according to my present opinion, subject to anything that the relators' counsel may say, I consider the Company not bound to provide; or if the Company do not think fit to adopt that course, they may, I apprehend, by lengthening the new portions of the road, and, by acquiring more land for the purpose from the common, make the curve sufficiently easy, and sufficiently convenient for the public, without altering or adding to the bridge. Because I think that that which is required for the public convenience may be effected in one of these ways, I am of opinion that the present injunction ought to be granted, not however exactly in the terms of the notice of motion, without prejudice to any application which either party may desire to make to the Railway Commissioners, in whom the powers of the Board of Trade for these purposes are vested.

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The order was as follows:—

That the defendants be restrained from crossing, breaking up, cutting through, or in anywise interfering with the Sheet-bridge turnpike road, or the communication thereof, or the traffic thereon, until they shall have caused to be made and appropriated for the use of the public a sufficient road over the railway, as convenient for passengers and carriages as the present turnpike road, or as near thereto as may be, or until further order, without prejudice to any application by either party to the Railway Commissioners under the Act; with liberty to apply.

1849.

May 22nd.

MAN v. RICKETTS.

A decree pronounced by the Master of the Rolls had, upon appeal to the House of Lords, been confirmed with some alterations, which the judgment of the House directed to be made therein. Pending the appeal, the cause was transferred to this branch of the Court. Upon a motion that the judgment might be made an order of Court, it was objected, that the decree not having been made by a predecessor of the Judge in this Court, it was competent to the Lord Chancellor alone to make the order asked; but the Court made the order.

Form of such order.

By a judgment of the House of Lords, which was made an order of this Court, the appellant was

ordered to pay to a respondent the costs of the appeal, the amount to be certified by the clerk-assistant; he accordingly certified the same at the sum of 70*l.* 1*9s.* 10*d.* The Court declined, upon an *ex parte* application, to direct a writ of *fi. fa.* to be issued. However, upon motion on notice, it ordered the appellant to pay the respondent the certified sum of 70*l.* 1*9s.* 10*d.*, but without interest or the costs of the application.

A DECREE made in this cause by the Master of the Rolls was, upon an appeal to the House of Lords, confirmed, with certain specified alterations in the terms of the decree; and the House directed that the remaining parts of the decree should be altered in a corresponding manner, and that the cause should be remitted to the Court of Chancery to do what was consistent with these variations.

After the decree had been made by the Master of the Rolls, the cause was transferred to this branch of the Court, to which it continued attached.

Mr. *Hallett* now moved, on behalf of the plaintiff, that the above judgment of the House of Lords might be made an order of this Court; and that the decree might be varied in accordance with the judgment (*a*).

Mr. *Wigram*, for some of the defendants, admitted that a decree by the predecessor of a Judge might be varied by his successor; but he submitted, that what was asked was to alter a decree made by the Master of the Rolls, a Judge of concurrent jurisdiction, and that it was not competent for this branch of the Court to do that. The order could be made only by the Lord Chancellor.

The VICE-CHANCELLOR considered he had jurisdiction to make the order, and directed the order to be made in the usual form.

(*a*) See Smith's Hand Book of Chancery Practice, p. 362.

The form of the order became the subject of discussion before the Registrar, and no order was drawn up.

Mr. *Hallett* brought on the motion again on these days. He stated that the Registrar desired to have the particular direction of the Court as to the precise form of the order to be made. That the Registrar also felt great difficulty as to the jurisdiction of this branch of the Court to make the alterations in the decree, which were substantial variations therein. That the suit being a very hostile one, it was of the utmost importance to the plaintiff that the decree should be quite accurate.

The VICE-CHANCELLOR directed the order to be drawn up according to the minutes. March 25th.

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March 16th
 & 25th.

The following is the form of the order made, which bore date as of the 22nd of May, 1849.

Whereas, by an order dated the 21st day of March, 1848, made by The Right Honorable the Lords Spiritual and Temporal in Parliament assembled, after hearing counsel on &c., upon the petition and appeal of the defendant Thomas Bourke Ricketts, complaining of a decree of this Court made on hearing &c., and praying that the same might be reversed or varied in the particulars therein mentioned, and due consideration had of what was offered on either side: It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the said decree complained of in the said appeal be, and the same is hereby affirmed, subject to the following variation; that is to say, by omitting the words '*The whole of the said testator's estates in Shropshire passed by his said will,*' and substituting in the place thereof, the words following: that is to say, '*The whole of the said testator's mansion-house and lands in Shropshire passed by his said will; and his Lordship doth order*

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and decree, that it be referred to the Master of this Court, to whom these causes stand referred, to inquire, whether the testator was, at the time of making his will, and at his death, entitled to any other estate or estates in Shropshire than such mansion-house and lands which passed by his said will; and also, by altering all such parts of the remaining portion of the said decree as are inconsistent with the variation hereby directed; And it is further ordered, that the said appellant do pay, or cause to be paid, to the said respondents, William Turquand and Charlotte Anne Halifax, the costs incurred by them in respect of the said appeal, the amount thereof to be certified by the clerk-assistant; And it is also further ordered, that, with these variations, the cause be remitted back to the said Court of Chancery, to do therein as shall be just and consistent with these variations and that judgment. Now, upon motion this day made unto this Court by Mr. *Hallett*, of counsel for the plaintiff William Turquand, in the presence of Mr. *Wigram*, of counsel for the defendant Thomas Bourke Ricketts, and Mr. *Terrell*, of counsel for the defendant Charlotte Anne Halifax, whereupon, and upon hearing what was alleged by the counsel for the plaintiff and for the said defendants Thomas Bourke Ricketts and Charlotte Anne Halifax, and upon producing the said order of the House of Lords, and hearing an affidavit of Christopher Haskett read, It was prayed, that the said order might be made an order of this Court; which is ordered accordingly.

May 30th.

Mr. *Wigram*, for the defendant Mr. Thomas Bourke Ricketts, now moved, that the above order might be discharged for irregularity. He submitted, that the order was wrong in form; that it was necessary for the Court to make all alterations in the decree that arose out of the decree of the House of Lords. There would be considerable doubt as to what the details of the decree were, as the

order now stood, which would create great confusion in any attempt to proceed upon the decree in the Master's office.

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v.
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Mr. *Hallett* in support of the order.

The VICE-CHANCELLOR said, that it might have been proper that the order should go further; and, if Mr. Ricketts had desired that, he should upon the motion have asked it to be done. This being a motion to discharge the order for irregularity, and not to vary it, he thought the motion must be refused, with costs.

The costs, directed to be paid by the defendant T. B. Ricketts, by the decree in the House of Lords, embodied in the above decree of the 22nd of May, 1849, were duly taxed and certified by George Shaw Lefevre, Esq., the clerk-assistant of the House, by his certificate dated the 21st of June, 1849, at 704*l.* 19*s.* 10*d.*

Application was thereupon made to the clerk of Records and Writs in Chancery; but he declined to issue a writ of *fi. fa.* except by direction of the Court.

Mr. *Hallett* applied *ex parte* for an order on the Clerk of Records and Writs to issue the writ of *fi. fa.*

The Court declined to make the order.

Mr. *Hallett* now moved, upon notice, for an order, that the defendant T. B. Ricketts might be ordered to pay to the plaintiff the sum of 704*l.* 19*s.* 10*d.*, being the amount of costs certified by Mr. Lefevre, to be demanded of and paid by the defendant to the plaintiff, pursuant to the above order and judgment of the House of Lords, which, by the order of the 22nd of May, 1849, had been made and then was an order of this Court, and for the payment of interest, and for the costs of the motion.

1851.
Jan. 17th.

Mr. *Rolt*, for the defendant T. B. Ricketts, said, the or-

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der of the House of Lords had been sent back from that House only for the purpose of being varied so far as was necessary. There was no need of an application to this Court, the House of Lords having full powers for enforcing its own orders. There was no precedent of such an order as that now asked.

The VICE-CHANCELLOR said, the order of the House of Lords had directed its order to be made an order of this Court, which had been done by the order of the 22nd of May, 1849. He thought that an order should be made in the terms of the notice of motion, except that it should be without interest and without costs.

1852.
 Feb. 26th.

Upon an appeal to the Lord Chancellor, both the orders were confirmed.

May 22nd.

HUMPHREY v. GREY.

Where the general costs of the suit are given to a party by the decree, they include the costs of a special case on which the opinion of a Court of law was taken under the direction in the cause of this Court.

BY the decree made on the hearing of this cause, relief was given according to the prayer as to part thereof; and the opinion of a Court of law was directed upon another part of the plaintiff's claim.

The opinion of the Court of common law was against the claim.

By the decree on further directions, so much of the plaintiff's bill as related to the matters as to which the opinion of the Court of law had been taken, was dismissed, and the decree proceeded in the following words:—"And refer it to the Taxing Master of this Court in rotation to tax the defendants their costs of this suit subsequent to the said decree; and let the same, when so taxed, be paid by the plaintiffs."

The Master, to whom the taxation of the costs under the above decree was referred, declined to allow the costs of the special case, on the ground that they were not costs of the suit. And the taxation of the costs stood over.

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HUMPHREY
v.
GREY.

Mr. *Bacon* now moved, on behalf of the plaintiff, that the decree might be amended, by inserting an express direction that the costs of the special case should be taxed. It did not appear that there was any authority on the subject.

Mr. *Glasse*, for a defendant, objected, that the discretion exercised by the Taxing Master, as to what costs were to be allowed under the terms of the decree, ought not to be lightly interfered with by the Court. Neither party was wrong in going to a Court of law; and if the defendant meant to obtain the costs of the proceedings at law, the decree ought to have expressly provided for them, as in *Forbes v. Peacock* (a); at all events, no direction varying the decree could be made, except upon a rehearing, when all the circumstances could be brought before the Court, which could not be done upon a motion.

The VICE-CHANCELLOR said, if there were neither settled practice nor binding authority to the contrary, he thought that the costs at law were included in the general costs of the suit given by the order; and that this expression of the opinion of the Court would probably be sufficient.

(a) 1 Phil. 717.

1849.

May 26th.

COOMBS v. BROOKS.

A proportion of a residue was bequeathed in trust for A., for life, with remainder to his children who should attain twenty-one; but, if he should have no child who attained twenty-one, to B. and her children in a similar manner. The testator had, after making his will, granted underlease, and transferred stock in favour of B. and her children. A. and his children filed a bill to set aside these transactions, on the ground that the testator was not, at the date of them, of sound mind. Issues were directed at the hearing.

Before any child of A. attained twenty-one, A. and his children presented a petition in a suit for the administration of the testator's estate, seeking an advance, out of the capital, of their contingent shares, to enable them to try the issue:—*Held*, notwithstanding the opposition of B. and her family, that the advance ought to be made, on an adult petitioner and his solicitor undertaking to abide by any order of the Court for its replacement, if the trial should be unsuccessful.

THIS was a legatee's suit for the administration of the estate of a testator named Savill Godfrey, who, by his will, bequeathed two-thirds of his residuary personal estate on trusts for the testator's cousin Mrs. Coombs, one of the plaintiffs, for life; with trusts by way of remainder in favour of the children who should attain twenty-one; and if no child should attain twenty-one, trusts were declared in favour of James Hayward, another cousin of the testator, and his children. The remaining one-third was bequeathed upon similar trusts for James Hayward, for life, with trusts in remainder for his children who should attain twenty-one, with a limitation to Mrs. Coombs and her children in the event of no child of James Hayward attaining twenty-one.

One child of Mrs. Coombs had attained twenty-one; but no child of James Hayward had attained that age.

A petition was now presented by James Hayward and his wife and children, praying, that out of the stock in Court standing to the contingent account of the petitioners, being the capital of the one-third bequeathed as above mentioned upon contingent trusts for their benefit, a sum of 300*l.* might be raised to enable them to try the issues directed in *Hayward v. Pursey*, reported ante, p. 399.

Mr. *Malins* and Mr. *H. Stevens* supported the petition.

Mr. *Russell* and Mr. *W. Rudall*, for the Coombs' family.

—The plaintiffs will be entitled absolutely to the fund, if

no child of Mr. Hayward should attain twenty-one; and they object to the advance out of the fund of a sum to try an issue which, they are sure, will produce no benefit to the estate, especially as the defendants, the Haywards, will be altogether unable to replace it. They referred to *Gregg v. Taylor* (a), *Peck v. Beechey* (b), and *Nye v. Maule* (c).

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COOMBS
v.
BROOKS.

Mr. *De Gex* appeared for the trustees.

The VICE-CHANCELLOR thought the cases cited did not apply to the present. The only persons who opposed the petition were individuals having a personal interest in supporting the transactions, the validity of which was in question. That, his Honor thought, could form no sufficient reason for not making an advance out of the fund, to which the petitioners were presumptively entitled, to enable them to prosecute the claim, on proper security being given for its replacement. And his Honor directed 260*l.* to be raised from the fund in question, on the undertakings of the defendant James Hayward and his solicitor to abide by any order for making good this amount, if the trial should be unsuccessful.

(a) 4 Russ. 279.

(b) 2 Sim. 40.

(c) 4 My. & Cr. 342.

1849.

May 22nd.

BELLAS v. HARMER, Bart.

Costs, charges, and expenses of and incidental to the sales of the real estates of the testator in the cause were by the decree ordered to be taxed and paid. On making out these costs, charges, and expenses, it appeared that 340*l.* had been paid for surveying and selling the estates, upon which the fee of taxation of 3*l.* per cent. attached. In order to avoid this fee, a motion was made, all parties consenting, to vary the order by only directing the Taxing Master to add to the amount of the taxed costs of the plaintiffs any sums which he should find to have been properly paid by them to any surveyor or other person as his charge for valuing or otherwise, in reference to the sales. The Court varied the order accordingly.

BY the decree made on the hearing of this cause on further directions, on the 24th of July, 1849, the costs of all parties, and also any costs, charges, and expenses of and incidental to the sales of the testator's real estates properly incurred by the plaintiffs and defendants, were directed to be taxed.

On taking an account of the costs, charges, and expenses incurred by the plaintiffs in the sale of the estates, it appeared that a sum of 340*l.* had been incurred as costs by them in surveying and settling the estates.

Mr. *Bloxam*, for the plaintiffs in the suit, now appeared in support of a motion to vary the decree.

He stated, that, under the 3rd schedule to the Orders of the 26th of October, 1842, as altered by the Order of the 12th of February, 1845, a fee of 10*l.* 4*s.*, being at the rate of 3*l.* per cent., would be payable for the taxation. All parties to the suit were desirous to avoid the payment of this heavy tax; and he suggested, that an alteration might be made in the order, in the same manner as had been done in *Gervis v. Gervis* (a), in December, 1847, by the Vice-Chancellor of *England*, whereby the fee of 3*l.* per cent. on a sum not properly an item for taxation would be avoided.

The VICE-CHANCELLOR made the order as asked.

The following is the form of this part of the order as it originally stood, with the additions as now made in italics:—

And it is ordered, that it be referred to the Taxing Mas-

(a) Reported, but not on this point, in 14 Sim. 654.

ter of this Court, to whom the taxation of costs in these causes stands transferred, to tax all parties their costs of these suits, including their costs of the said petitions subsequent to the last taxation thereof; the costs of the defendants to be taxed as between solicitor and client: and also to tax and settle any costs, charges, and expenses, of and incidental to the administration of the said testator's estate, and the sales of the said testator's real estates, properly incurred by the said plaintiffs and defendants.

And it is ordered, that the said Taxing Master do add to the sum which he shall find to be the amount of the said costs, and of the said costs, charges, and expenses of the said plaintiffs, any sums which he shall find to have been properly paid by them to any surveyor or other person as his charges for surveying, valuing, or otherwise, in reference to the sales of the said testator's real estates; and the Master is to certify the total amount of all such costs, and costs, charges, and expenses, *and sums of money as aforesaid*. And it is ordered, that so much of the 15,409*l.* 6*s.* 3*d.* Bank 3*l.* per cent. Annuities, standing in the name of the said Accountant-General in trust in these causes, as will be sufficient to raise the amount of the said costs, and costs, charges, and expenses, when taxed, *including such sums of money as aforesaid*, be sold with the privity of the Accountant-General; and one of the Cashiers of the Bank is to have notice to attend and receive the money to arise by the said sale; who, upon the receipt thereof, is to pay the same into the Bank with the privity of the said Accountant-General, to be there placed to the credit of these causes. And out of the money to arise by such sale, when paid in, it is ordered, that the said costs, and costs, charges, and expenses, when taxed, be paid in manner following, that is to say, the costs, and costs, charges, and expenses of the plaintiffs, *including any such sums of money so paid as aforesaid*, to Mr. Edward Bloxam, their solicitor.

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 BELLAS
 v.
 HARMER.

1849.

May 24th.

POWELL v. HALL.

A cross-bill was filed by a defendant to an original suit, relating to the subject of that suit, and setting forth facts, not contained in the original bill, and forming a defence to it, and praying a discovery and that the suit might be taken as a cross-suit, and for general relief. The original bill was then dismissed, with costs, by an order of course, on the motion of the plaintiff; but the plaintiff in the cross-suit insisted on proceeding with his suit. A demurrer to such cross-bill was overruled.

SIR BENJAMIN HALL filed a bill against the present plaintiff, Thomas Powell.—And afterwards, on the 16th of April, Thomas Powell filed his bill against Sir Benjamin Hall, setting forth facts and circumstances relating to the allegations of the original bill, which shewed that the plaintiff in the original suit was not entitled to the relief he asked, and praying for discovery, and that the suit might be taken as a cross-suit to the original suit of Sir Benjamin Hall, and that it might be declared that he was not entitled to the relief prayed by his original bill; and that he might be decreed to pay the costs of both suits; and that the plaintiff Thomas Powell might have such further and other relief in the premises as the nature of the case might require.

The original bill was dismissed with costs by an order of course, obtained upon the plaintiff's application on the 25th of April, 1849; but the plaintiff in the cross-bill declined to dismiss it without some acknowledgment of his rights in the subject matter of the suits being made.

A general demurrer, filed on the 30th of April, 1849, by Sir Benjamin Hall to this bill for want of equity now came on to be argued.

Mr. Russell, Mr. Wigram, and Mr. Goldsmid, for the demurrer.—This is a cross-bill. It is true that the original bill makes, as it has been said, a present of the equity to the cross-bill; but that is good only as long as the first bill remains, so that a decree might have been made upon that bill. What is said by Lord Redesdale (a) as to a demurrer to a cross-bill, must be taken with reference to the authorities there cited. One of these is *Kemp v. Mackrell* (b), where Lord Hardwicke says, "The cross-bill is a defence and al-

(a) Mitf. on Plead. 203, 4th edit.

(b) 3 Atk. 812.

ways considered so, and therefore but one cause." The present suit ought not to be allowed to proceed after the principal suit has been determined.

They also cited *Doble v. Polman* (a), *Sir John Warden's case* (b), *Calverley v. Williams* (c), *Angell v. Westcombe* (d), *James v. Herriott* (e); and *Westfield v. Shipworth* (f); and referred to the 41st & 42nd Orders of the 26th of August, 1841.

This bill asks for a declaration of right, and for no specific relief beyond that declaration; and upon such a prayer this Court could give no relief at the hearing: *Clough v. Ratcliffe* (g); and the bill is, on this ground, demurrable.

Mr. Bacon and Mr. W. M. James were not called on to support the bill.

The VICE-CHANCELLOR:

This is the case of a cross-bill, a demurrer to which, it is conceded, and it is plain, could not have been sustained, if it had been confined to seeking discovery, and had not sought relief. The question is, whether, considered as a cross-bill, the prayer for relief renders it demurrable?

Now the cross-bill relates to the subject of the original suit, and shews a good defence to the original bill, but not by way of merely negating the allegations and charges contained in the original bill. It adds facts to the record, which, if true, displace the relief asked by the original bill. I am of opinion, that such a bill is not demurrable. The demurrer must be overruled, but without costs.

By consent the bill was dismissed, the defendant paying the costs up to the time, and exclusive of the costs of the demurrer.

(a) Hardres, 160.

(b) Cited in *Burgess v. Wheute*,
1 Sir W. Bl. 132.

(c) 1 Ves. jun. 210.

(d) 6 Sim. 30.

(e) 6 Sim. 428.

(f) 7 Jur. 499.

(g) 1 De G. & S. 178.

1849.

May 28th &
29th.

WRIGLEY v. SWAINSON.

WRIGLEY v. WRIGLEY.

Where a husband, before his marriage, had sufficiently early notice that it was intended to settle the bulk of the intended wife's property, and nothing passed to justify a belief, on the husband's part, that, at the time of the marriage, no such settlement had been made:—
Held, that the husband was not entitled to set aside a settlement, which it appeared had been made before the marriage, although he was no party to it, and was not proved to have been actually cognizant of any settlement having been made.

THIS was a suit to set aside a settlement made between the times of a proposal for marriage and of the marriage itself, as a fraud on the marital right.

In May, 1845, the plaintiff made the proposal for marriage to Elizabeth Jones, afterwards his wife, and one of the defendants, at that time in the service of a Mr. Swainson.

On the 7th of July, 1845, Miss Jones executed the settlement in question, which was dated on that day, and made between Miss Jones of the one part, and three trustees, one of whom was Mr. Swainson, of the other part. After reciting that Miss Jones was entitled to 2100*l*, then in the hands of Messrs. Clayton and Gladstone, and of London and Greenwich Railway shares, and that she was desirous of settling the same upon the trusts after declared, she thereby assigned the money and shares to the trustees, upon trust to pay the income to her for her separate use, independently of any husband she might afterwards marry, and to stand possessed of the capital after her death upon trust for her children, and in default of any children upon trust for such persons and purposes as she should by will appoint, and in default of appointment upon trust for her relations.

The suit was instituted by the husband against the wife and her trustees to set aside this settlement. There was also a cross suit instituted by the wife by a next friend to have the settlement carried into effect.

Evidence was gone into in both suits; and one witness deposed, that Mr. Wrigley, before the execution of the settlement, had an interview with Mr. Swainson; and that, previously to such interview, Mr. Wrigley told the witness that he was going to see Mr. Swainson, and that Mr. Swainson was about to talk with him concerning Miss Jones'

Downes v. Jennings 32 Beav. 298.

property and a settlement. She also deposed, that, after Mr. Wrigley had seen Mr. Swainson, he told her that everything was arranged satisfactorily, and that all would be comfortable. The witness was positive the word "settlement" was used in the conversation.

Mr. Wrigley, in his answer in the cross suit, admitted, that in an interview with Miss Jones, his then intended wife, he had said, that as his business did not require much capital, he should not want any part of her property for the purposes of his business; and that, therefore, he would not object to her capital being settled so as to remain at her disposal. He admitted the interview with Mr. Swainson, and that he had said he should not want any of her property for his business; but he added, that he had no intention of becoming bound by any settlement of her property which might be executed without his further concurrence, or of authorising Mr. Swainson to cause any settlement of such property to be prepared or executed.

There was no evidence of Mr. Wrigley having had notice that any settlement had been executed before the marriage.

Mr. *Russell* and Mr. *C. T. Simpson*, for Mr. Wrigley, cited *Goddard v. Snow* (a), and contended, that upon the evidence it was clear, that the settlement was kept from the knowledge of Mr. Wrigley till after the marriage, and was a fraud upon the marital right.

Mr. *Wigram* and Mr. *Bazalgette* for the trustees; and Mr. *Bacon* and Mr. *Follett* for Mrs. Wrigley.—There is no proof of any concealment. On the contrary, the intention to make a settlement was communicated to Mr. Wrigley and met with his assent. He had every reason to believe that a settlement would be made; and it has never been held necessary that the exact terms of it should be made known to

1849.

WRIGLEY
v.
SWAINSON.
WRIGLEY
v.
WRIGLEY.

(a) 1 Russ. 485.

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 WRIGLEY
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 WRIGLEY
 v.
 WRIGLEY.

the husband. There has been no fraudulent concealment. —The following cases were referred to: *Strathmore v. Bowes* (a), *De Manneville v. Crompton* (b), *St. George v. Wake* (c), *England v. Downs* (d), and *Taylor v. Pugh* (e).

Mr. Russell, in reply.

The VICE-CHANCELLOR:—

It would probably be improper to decide against the validity of this settlement without knowing the testimony that Mr. Swainson would give, if examined as a witness.

The question however is, whether it is necessary to put the parties to the expense and delay which would arise from examining Mr. Swainson. That question depends on two others, which may, I think, be represented thus:—whether it is a just inference from the evidence, that Mr. Wrigley had notice in fact before his marriage, and notice in fact early enough before the marriage, that it was intended by Miss Jones, now Mrs. Wrigley, and by Mr. Swainson, previously to the marriage, that her property or the bulk of it should be settled; and secondly, whether, if Mr. Wrigley married under the impression that a settlement of her property had not been made, that belief or impression was one which he was not justified in entertaining.

And I think these questions ought to be answered in the affirmative. The facts already proved are, in my judgment, sufficient to preclude him from complaining that he married, if he did in fact marry, without notice of the settlement. I think, that, consistently with all the authorities, the relief which the plaintiff Mr. Wrigley asks ought to be refused.

I think that the two bills ought to be dismissed, with costs; and I so dismiss them.

(a) 2 Cox, 28.
 (b) 1 V. & B. 354.
 (c) 1 M. & K. 610.

(d) 2 Beav. 522.
 (e) 1 Hare, 608.

1849.

June 9th.

MORGAN v. ANNIE.

THIS was a suit praying for a declaration, that a will, which had been admitted to probate, was not a valid execution of a testamentary power of appointing certain personal estate. The grounds on which the alleged execution was sought to be impeached were, that the testatrix was, at the time of making the alleged will, incompetent to execute the power, from being in a state of intoxication; and that, upon the face of the will, it appeared to have been made under a misapprehension.

The Court has jurisdiction to decide upon the validity of the execution of a testamentary power over personalty, with reference to the state of the donee's mind at the time of the alleged execution.

Mr. *Russell*, Mr. *Bacon*, and Mr. *Nalder*, in support of the bill, adduced evidence as to these allegations, and submitted, that as the question was one of the execution of a power, a Court of equity had jurisdiction to interfere.

Mr. *Wigram*, during the argument on behalf of the plaintiff, referred to *Allan v. Macpherson* (a).

The VICE-CHANCELLOR said, that, as the matter stood, he had no doubt of the jurisdiction of the Court to interfere. *Allan v. Macpherson* was not a case turning on the validity of the execution of a power. But his Honor thought he had not sufficient materials before him to warrant the interference of the Court. If the plaintiffs chose to institute proceedings to recal the probate, the bill might be retained, to give them an opportunity of so doing. Otherwise, the Court would be satisfied with the evidence afforded by the probate.

The decree directed the bill to be retained for a year.

The suit was afterwards compromised.

(a) 1 H. L. Cas. 191.

1849.

June 5th &
11th.

Unreceived dividends held not to pass under the words "ready money."

MAY v. GRAVE.

WILLIAM MAY, by his will, bequeathed as follows: "I give and bequeath all and singular my ready money, monies in the funds, live and dead stock, and growing crops, household furniture, fixtures, wines and other liquors, plate, linen, china, horses, harness, carriages of all sorts, implements and utensils in husbandry, and all other my property and effects, except securities for money, which shall be in, upon, or about the messuage or tenement, farm, and lands in my occupation at the time of my decease, unto my dear and loving wife Elizabeth May, to and for her own use and benefit."

By a codicil the testator bequeathed as follows: "Whereas I have in and by my said will given and bequeathed unto my dear wife Elizabeth, all and singular my ready money and other my personal estate, including monies in the funds, with an exception as to securities for money, as therein mentioned: Now it is my will and meaning, and I do hereby revoke that part of the said bequest which includes monies in the funds; and direct that, from and after the decease of my said wife, the same shall sink into and form part of my residuary personal estate, for the benefit of my residuary legatees."

The cause now came on upon exceptions to the Master's report.

Part of the testator's estate consisted of 1210*l.* 10*s.* for dividends on 23,800*l.* 3*l.* per cent. Reduced Bank Annuities, and 4000*l.* New 3½*l.* per cent. Annuities, which had accrued due in the testator's lifetime, but the dividend warrants for which had not been received by him.

The Master had found that this sum formed part of the testator's personal estate specifically bequeathed, considering that it passed under the term "ready money."

To this finding the residuary legatees excepted.

Hanning & Russell T. D. M. & J. 59.

Mr. *Bacon* and Mr. *C. Ellis*, in support of the exceptions.
—The dividends in arrear cannot be regarded as ready money. They were debts due to the testator at his decease:
Foster v. Bank of England (a).

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Mr. *Malins* and Mr. *Hardy* were for the executors.

Mr. *Swanston*, Mr. *Calvert*, and Mr. *Goldsmid*, in support of the Master's finding.—The dividends are placed by the Government in the Bank, to be paid to the stock holders. They do not constitute a debt from the Bank to the holders; but are really monies deposited for their use, and are therefore much more within the term "ready money" than money at a banker's, which is clearly not a deposit, (the banker being at liberty to use it), and yet that has been held to pass under the term "ready money:" *Parker v. Marchant* (b), *Vaisey v. Reynolds* (c), *Taylor v. Taylor* (d), *Fryer v. Ranken* (e).

THE VICE-CHANCELLOR:—

With deference to the Master, it appears to me, that, consistently with *Vaisey v. Reynolds*, *Parker v. Marchant*, and *Fryer v. Ranken*, he might have found in favour of the exceptants. The dividends in question were due on stock belonging to the testator, for which he had not received or demanded the dividend warrants. The testator going himself, or any person acting for him under a power of attorney, might have obtained the dividend warrants, and might have converted them into cash; but my opinion is, that dividends, in that situation, are not "ready money," unless there is something in the context to give the words some other than their ordinary meaning.

It has then been argued, that, even assuming the language of the will to be open to doubt, the codicil made a

(a) 8 C. B. 689.

(b) 1 Y. & C. C. C. 290.

(c) 5 Russ. 12.

(d) 1 Jur. 101.

(e) 11 Sim. 55.

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difference in favour of the widow; but I do not think it would be proper so to construe the words of the testator in this codicil. My opinion is, that the widow did not take these dividends.

The exceptions must be allowed, the deposit be returned, and the costs be costs in the cause.



June 22nd.

WHITFIELD v. LEQUEUTRE.

A purchaser under a decree of leaseholds presented a petition to be discharged from his purchase, on the ground that a share in the property had been bequeathed upon trusts, and that the bequest appeared, by inference from the pleadings, to have been assented to; but that some of the cestuis que trustent were infants, and were not before the Court. The assent was disputed:—*Held*, that the purchaser was not entitled at once to be discharged, but only to a reference to the Master as to title.

THIS was the petition of a purchaser under a decree of leaseholds, seeking to be discharged from his purchase, on the ground that the suit was defective for want of parties, and was not otherwise properly constituted to support the direction for sale.

The suit was instituted by a husband and wife against the trustees of a deed, the two sisters of the wife, the husband of one of them, and certain incumbrancers.

The bill stated the deed of trust, whereby the leaseholds were limited, upon trust, as to one fourth part, for the separate use of the female plaintiff; as to two other fourths, for the separate use of her two sisters, who were defendants; and as to the remaining fourth, for the separate use of another sister (who had since died) in equal shares; and the bill stated, that the last-mentioned sister had, by her will, bequeathed her share to the two sisters, who were defendants, and appointed them executrices of her will, which they had proved. The bill charged, that the defendants therein mentioned, including the two sisters, had charged the trust premises, or some share or interest therein, with the payment of some sums or annuities to the defendants, the incumbrancers. The prayer of the bill was for the removal of the trustees, on the ground of misapplication of the rents and profits, and for accounts, and to have it declared, that the undivided fourth share of the plaintiffs was not subject, or only partially subject, to the

incumbrances; but the bill did not pray for a sale of the leaseholda.

The answer of the sisters set out certain indentures, made in the years 1842 and 1843, (after the death of the deceased sister), whereby, after reciting the bequest of the testatrix's share to the sisters as an absolute bequest, they assigned her share (among others) upon trust for securing annuities to the incumbrancers, in consideration of a sum paid to the husband of one of the executrixes.

The decree declared that the plaintiff's share was not subject to the incumbrances; it directed accounts, and then proceeded to order, that, at the request of the plaintiffs, and by the consent of the defendants, the property should be sold: the conduct of the sale being given to the defendants, the incumbrancers.

The sale took place in January, 1848.

In May, 1848, the purchaser, objecting to the title, and not having taken any steps to have the purchase approved by the Master, gave notice that he declined to complete.

In July, 1848, the defendants conducting the sale moved for and obtained the usual report approving the purchase; and in Michaelmas Term, 1848, they obtained an order confirming the Master's report absolute.

In January, 1849, the defendants moved that the purchase-money might be paid into Court.

The purchaser thereupon presented the present petition; and it was arranged that the motion and petition should be heard together.

The matter then stood over from time to time till June, 1849, at the request of the respondents, the incumbrancers.

The principal objection was, that, on inspecting the will of the deceased sister, it appeared that the bequests in it were incorrectly set out in the bill; and that in fact a life interest only was given to the executrixes, with remainder to the children of one of them who were minors; and that, by the concurrence of the executrixes in the grants of the

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annuities and this assignment of their deceased sister's share containing the incorrect recital, they must be held to have assented to the bequest, and could not now make a title as executrixes.

The infancy of the two legatees in remainder, and the real terms of the will, were stated by affidavits only; but they were not contradicted or disputed.

Mr. *Malins* and Mr. *Haddan*, in support of the petition.—The assignment of the deceased sister's share on trusts to secure an annuity could only have been made by her sisters in their characters of legatees, and therefore is evidence of an assent to the bequest.

The infant cestuis que trustent ought therefore to have been parties; and, if they had been, the decree for sale (which was and could only be made by consent,) would never have been pronounced. The objection is one of substance, which cannot be removed; and, as it appears on the pleadings, when the will is looked at, the petitioner is entitled at once to be discharged: *Lechmere v. Brasier* (a), *Calvert v. Godfrey* (b), *Lloyd v. Jones* (c), *Curtis v. Price* (d), *Baker v. Souter* (e), *Ward v. Tratham* (f), and *Dalby v. Pullen* (g).—They also referred to *Sherwood v. Beveridge* (h).

Mr. *Wigram* and Mr. *Miller* for the respondents.—All the petitioner can have is a reference as to the title. The execution of the assignment did not amount to an assent to the bequest; and, if it did, the will contains powers enabling the executrixes to make a title.

The VICE-CHANCELLOR, in the course of the argument, adverted to the length of time which had elapsed since the discovery of the objection. At its close, his Honor said—

(a) 2 J. & W. 289.

(b) 6 Beav. 97.

(c) 12 Sim. 491.

(d) 12 Ves. 89.

(e) 10 Beav. 343.

(f) 14 Sim. 82.

(g) 1 R. & M. 296.

(h) Ante, p. 425.

When a decree is manifestly wrong, by reason of the absence of a necessary party from the record, a purchaser may be entitled to be discharged, without any reference as to title. But in this case, the question, whether all proper parties were before the Court, depends on extraneous circumstances, which must be the subject of inquiry in the Master's office. Every one accedes to the authority of *Lechmere v. Brasier*. Neither that nor the more recent cases cited apply to this. It is here disputed, whether the bequest was assented to or not. I am not now in a position to decide that controversy. It is also said, that there is some power of sale, under which the objection, if it exists, may be removed. I have not the means of deciding either question at present. There must be the usual reference as to title.

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An order directing a reference was made upon the motion and petition, but was not proceeded with, the matter having been compromised.

SHORE v. WEEKLY.

June 27th.

WILLIAM WEEKLY SHORE made his will, dated the 30th of March, 1842, containing the following bequest:— I also give and bequeath to my said wife, all my live and dead farming stock and crops, implements of husbandry, and household furniture and effects, to and for her own use and benefit, and also all the dividends and interest of all my money in the funds, and all other my personal property, during her life, subject nevertheless, in the meanwhile, to her paying thereout to the widow of my late son William 100*l*. per annum, as long as she continues unmarried, for her maintenance, and to enable her to bring up his children; and after the decease of my wife, I give and bequeath the said dividends and interest, and the princi-

Unreceived dividends held not to pass under a bequest of the dividends and interest of all the testator's money in the funds to a legatee for life.

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pal monies, from which the same may arise, unto and equally between the children of my said son, on their respectively attaining the age of twenty-one years."

At the time of the testator's death, there was 200*l.* due to him in respect of unreceived dividends. The question was, to whom this belonged.

Mr. Russell and *Mr. Giffard* for the plaintiffs.

Mr. Wigram and *Mr. W. Bovill*, for the widow, contended, that the unreceived dividends were bequeathed to her.

Mr. Hanson for the executors.

The VICE-CHANCELLOR held, that the widow was not entitled to the unreceived dividends; but that they formed part of the general residuary estate.



June 30th.

CHEETHAM v. STURTEVANT.

Where a reference had been directed to inquire whether an offer for the purchase of leaseholds was beneficial, and ought to be accepted, and the Master reported in favour of the purchase:
 —*Held*, that the purchasers were entitled to the rents from the date of the order of reference.

THIS was a creditors' suit. An offer of 2500*l.* was made on the 10th of October, 1846, by the Ecclesiastical Commissioners for the purchase of leaseholds, forming part of the estate of the testator in the cause. In reply to the offer, the solicitor of the trustees (who were defendants) wrote, on the 11th of November, 1846, stating that he had sent the proposal of the Commissioners to his agents, to be submitted to the Master. A reference to the Master was, on the 22nd of January, 1847, directed, on the petition of the plaintiff, to inquire whether it would be fit and proper, and for the benefit of the creditors of the testator, that the offer should be accepted.

The Master, by his report dated the 15th of June, 1847, which was confirmed on the 30th of July, 1847, found in favour of the acceptance of the offer.

The Ecclesiastical Commissioners paid the purchase-money into Court on the 29th of June, 1828, under the order confirming the report, and without prejudice to any question as to the time from which they were entitled to the rents. They then presented their petition, praying, that they might be declared entitled to the rents from the time of the offer; and submitting to pay interest from that period on the 2500*l*. The petition now came on to be heard with the cause.

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Mr. *Wigram* and Mr. *Murray*, for the Ecclesiastical Commissioners.—The offer was made with reference to the value at that time. It would be most unjust to compel the purchasers to pay the same amount for the less valuable interest which must necessarily exist at any subsequent period. They must, therefore, be considered to be entitled to the rents from the time of the offer.—They referred to *Dyer v. Hargrave* (a), *Anson v. Towgood* (b), Sugden on Vendors and Purchasers (c).

Mr. *Teed*, Mr. *K. Parker*, Mr. *Malins*, Mr. *Rogers*, Mr. *Daniell*, Mr. *Goodeve*, and Mr. *Shebbeare*, for the parties to the cause, contended, that, according to the general practice, the date of the confirmation of the report was the time from which a purchaser was entitled to the rents; and that, until the confirmation of the report, there was no contract, but only an unaccepted offer. They referred to *Twigg v. Fifield* (d).

Mr. *Wigram*, in reply, submitted, that the offer had been accepted when made, subject only to the approval of the Court, which, when obtained, must, in common justice, relate back to the time of the offer.

(a) 10 Ves. 510. (b) 1 J. & W. 637. (c) Page 805, 11th edit.
 (d) 13 Ves. 517.

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The VICE-CHANCELLOR:—

This is not a case of a private bargain. It was obvious, that there would of necessity be some delay between the offer and the acceptance, over which those to whom the offer was made could have little or no control. Nor is this a sale under the Court's direction. It is a sale out of Court, confirmed by the Court. I am disposed to think, that the proper course will be, to give the purchasers the rents from the date of the order of reference.

Ordered accordingly.



June 12th.

HARRIS v. HAMLYN.

Where the solicitor to the suitors' fund has been appointed to act, and acts as guardian for infant defendants in a foreclosure suit, at the request of the plaintiff, under the 28th Order of October, 1842, the Court, upon making a decree of foreclosure, will direct the plaintiff to pay the guardian's costs, and to add them to his own, even where the security is inadequate.

THIS was a suit by a mortgagee, praying the usual decree of foreclosure. Some of the defendants, who were the devisees of the mortgagor, were infants. They did not appear to the bill; and on the application of the plaintiff, the solicitor to the suitors' fund was appointed their guardian, under the provisions of the 28th Order of October, 1842.

At the hearing, the usual decree of foreclosure was taken; but on settling the minutes, a question arose, whether any express provision should be made for the costs of the solicitor to the suitors' fund, as the guardian defending for the infants.

The cause was now mentioned on this point.

Mr. *Hanson*, for the plaintiff, stated the point, and submitted, that, the plaintiff's security being inadequate, it was a hardship on him to pay the costs of the solicitor to

the suitors' fund, who had no higher title to costs than the infant defendants, for whom he acted.

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Mr. *Taylor*, for the solicitor to the suitors' fund, contended, that his costs ought, at all events, to be provided for. He had been appointed under the order at the instance of the plaintiff, and for his benefit.

The VICE-CHANCELLOR:—

I must make an election between two kinds of injustice; and I think it the less injustice to make the plaintiff pay the costs of the infant defendants in this suit, and add them to his own; and I so direct, unless there is decision against it. The solicitor to the suitors' fund, an officer of this Court, ought not to lose his costs, he having been appointed to act, for the convenience and at the request of the plaintiff.

JONES v. LEWIS.

June 26th.

A TESTATOR by his will, dated the 22nd of March, 1820, gave and bequeathed the residue of his personal estate unto Edward Lewis, Thomas Neville, and Griffith Jones, upon trust to convert the same into money, and to place the monies to be so produced in the public stocks and funds of Great Britain, or on some good and approved freehold or leasehold securities at interest, with power to alter and vary such securities for other funds and securities of

Trustees were directed by a will to place the trust monies in the public funds, or on some good and approved freehold or leasehold securities, at interest. The trustees, acting *bonâ fide*, had, in 1828, upon the re-

port of a surveyor, (who had valued the property at 3500*l.*, and the annual rental at 175*l.*), lent 2600*l.*, part of the trust monies, upon a mortgage, with powers of sale, of the valued property, and which consisted of four freehold messuages, at the time in an unfinished state, the actual yearly rent of which being only 105*l.* The mortgagor having become insolvent, the trustees sold the property in 1836, which then realised less than the amount lent by 353*l.* 4*s.* 2*d.*, and that sum was lost to the estate. In a suit by a *cestui que trust*, the Court declined to charge the trustees with the loss, and allowed them their costs of suit, and their costs, charges, and expenses.

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Vickers v. Evans 33 Beav. 381
Badger v. ... 7 Cl. 721

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the like nature in the discretion of his said trustees, and upon trust to dispose of the income as in the will mentioned.

Upon a bill filed by the plaintiff, who was beneficially interested in the residue, against Edward Lewis and Thomas Neville, as the executors and trustees under the will, for the due execution of the trusts of the will, a decree was made, with a direction to the Master to inquire (among other things) and state, how and in what manner the testator's estate had been from time to time invested, and under what circumstances any loss was sustained on the money advanced to one William Hickin.

In pursuance of such direction, the Master by his report found that the defendants, the executors, had, on the 11th July, 1828, advanced 2600*l.*, part of the testator's personal estate, to William Hickin, by way of mortgage, on the security of four freehold messuages, two of which were unfinished and unoccupied, and about three acres of land, situate at the Lozells, in the parish of Aston near Birmingham; and that, previously to such investment, the estate was surveyed and valued by Ebenezer Robins (a surveyor and valuer), who valued the same at the sum of 3500*l.* and the rental at 175*l.* per annum; and who stated, that the alterations which were going on in the neighbourhood, calculated to improve it, would induce him to value the property, if it were his own, at 4000*l.* The Master also found that the defendants, the executors, Edward Lewis and Thomas Neville, were afterwards obliged, in the performance of the trusts of the testator's will, to sell the mortgaged premises; and that the same were accordingly sold by public auction; and that, after payment of interest and expenses, the principal sum of 353*l.* 4*s.* 2*d.* remained due in respect of the mortgage; which sum had been wholly lost, together with interest thereon at the rate of 5*l.* per cent. per annum from the 20th of February, 1836. The Master also found that William Hickin, the mortgagor, took the benefit of the Insolvent Debtors Act in 1831.

The Master also reported, that 74*l.* 5*s.* 3*d.* was due to the defendant Lewis, who had been the acting executor, on the balance of his accounts, Mr. Neville, the other executor, not having received or paid anything.

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It appeared from the examination and cross-examination of Mr. Robins, a witness for the defendants, the executors, before the Master, that the 2600*l.* had been lent upon the security of the four houses and three acres of land, that two of the houses were at the time unfinished, and that the actual rent of the two houses which were let was 105*l.* a year only; that the mortgagor Hickin, a jeweller of Birmingham, had taken the land as a building speculation, and that its value depended, in some measure, upon the success of the speculation, and that his (Robins') opinion as given in the valuation was formed with reference to the letting capabilities of the property, and that the value had been estimated on a consideration of its value as building land.

The cause now came on to be heard upon further directions.

Mr. *Russell* and Mr. *C. Hall*, for the plaintiff.—The investment made in this case, was made on a security consisting of unfinished houses, part only occupied, and producing a yearly rental less in amount than the annual interest of the money lent. This cannot be called a "good and approved freehold security" within the terms of the trusts of the will. Moreover, the executors must be taken to have had full knowledge of the speculative character of the property; and that it was by no means such a property as they were justified in accepting as a security. But, if the property were the most eligible of its kind, the trustees were not justified in advancing more than two-thirds of its value on it: *Stickney v. Sewell* (a). They have exceeded this ratio by a sum exceeding 250*l.* The trustees ought not to have been satisfied with the estimate of one sur-

(a) 1 My. & Cr. 8.

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veyor, especially in a case like the present, in which the surveyor had looked so much, as he appeared to have done, to problematical value.

Mr. *Swanston* and Mr. *Craig* for the trustees.—The valuation was procured expressly with reference to the advance, which is now objected to. No question of the bona fides of the trustees is raised; and it would indispose all trustees to the exercise of any useful discretion, if these executors should be held liable to make good any deficiency arising from the insufficiency of the investment.

Mr. *F. J. Hall* for other parties.

Mr. *Russell* replied, insisting that the investment under the circumstances was a breach of trust; and that the trustees were, at least, chargeable with the costs of the suit for conduct which had raised the question.

The VICE-CHANCELLOR:—

This was a trust to invest in the funds, or upon good and approved freehold or leasehold securities. No one insinuates that the transaction was, to use a common expression, “a job” between any persons. The trustees appear to have acted honestly in the whole affair. It would, I think, be unjust in this particular case, and unwise with reference to the general conduct of the affairs of mankind, to charge the trustees with the loss which has arisen. It would not be more proper to make any difference on this account as to costs.

By the order, the costs of all parties as between solicitor and client, and the costs, charges, and expenses of the trustees properly incurred, were directed to be taxed, and paid out of the fund in Court.

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AARON v. AARON.

June 27th.

JOHN AARON by his will, dated the 25th of August, 1828, duly executed in the presence of and attested by three witnesses, gave unto his grandson James Aaron, his heirs, executors, administrators, and assigns, for ever, all his real and personal estates whatsoever, subject to and chargeable with the payment of the annuity and legacies thereafter mentioned, and also of his debts. The testator also gave unto his son John Aaron for his life an annuity of 20*l*. He also gave unto his nephew Mark Aaron a legacy of 400*l*.; and he gave other legacies. And in case his said grandson James Aaron should die without leaving lawful issue, the testator devised unto his (the testator's) nephew Mark Aaron, and his heirs, all his freehold hereditaments; and he appointed his said grandson James Aaron executor of his will.

The testator made a codicil to his will, dated the 21st of May, 1831, which was attested by two witnesses only; and thereby, after revoking the annuity given in his will to his son John Aaron, the testator gave to Ann Aaron, the wife of the said John Aaron, an annuity of 70*l*., free from the control of her husband, with a power of entry and distress to her over his real estate in case the annuity should be in arrear. And the testator gave to the four sons of Mark Aaron, viz. Thomas, John, William, and Mark, the sum of 100*l*. each. And the testator ratified and confirmed his will in all other particulars.

The testator afterwards made a second codicil to his will, dated the 26th of September, 1831, which was duly executed and attested by three witnesses, in which the following recital occurs:—"Whereas, I, John Aaron, &c., have made and duly executed my last will and testament in writing, bearing date the 23rd day of August, 1828, and also a codicil annexed thereto, bearing date the 21st day

A testator made his will, duly attested so as to pass freehold estate, dated in 1828. In May, 1831, he made a codicil, which was attested by two witnesses only, declaring it to be a codicil to his will, and directing that it should be annexed thereto. This codicil varied the disposition of parts of his real estate. In September, 1831, he made a second codicil, duly attested so as to pass freehold estate, which he declared to be a second codicil to his will, and directed the same to be annexed thereto and taken as part thereof. The second codicil concluded by confirming his will:—*Held*, that the second codicil gave the same effect to the first codicil as if it had been duly attested by three witnesses.

*Donner & Newbery 1*l*. 2*l*. 23*l**
*Peen & Co. 9*l*. 2*l*. 23*l**

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of May, 1831;" and he thereby revoked the devise of his real estate contained in his will to his nephew Mark Aaron and his heirs, and devised his real estates, in the event of his grandson James Aaron dying without issue, unto his two granddaughters Mary Ann Wheelhouse and Charlotte Aaron during their lives, the rental to be equally divided between them; and the testator directed, that, at their decease, whatever children they might have should be entitled in the manner set out in this second codicil. And the testator concluded his second codicil thus:—"And I do hereby ratify and confirm my said will in all other particulars thereof."

The testator died in October following the date of the last codicil, and his will and two codicils were proved by James Aaron, on the 1st of November, 1831.

In a suit by the plaintiff Mark Aaron, the testator's nephew, against James Aaron and the other persons claiming to be beneficially interested under the will and two codicils, a question arose, whether the devises and gifts contained in the first codicil, so far as they related to or affected to charge the real estate of the testator, failed, by reason that the execution of that codicil by the testator was not attested by three witnesses; or whether the reference to the first codicil contained in the second codicil, the execution of which by the testator was duly attested by three witnesses, although it did not in express words confirm the first codicil as well as the will, was sufficient to give it validity.

Mr. *Faber* for the plaintiff; and

Mr. *Kyle* and Mr. *Robson*, for defendants in the same interest with the plaintiff, submitted that the second codicil set up the first; and that the first codicil was valid as to the real estate of the testator, although it was attested by two witnesses only: *Gordon v. Lord Reay*(a), *Guest v. Wil-*

(a) 5 Sim. 274.

lasey (a), *De Bathe v. Lord Fingal* (b). It was unnecessary for that purpose that the documents should be written on the same paper, or be attached: *Doe d. Williams v. Evans* (c). *Bayley*, B., in that case said, "The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet. Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up. The language is, 'Codicil:—I, David Evans, make a codicil,' which word implies an addition to a former instrument. It proceeds 'a codicil to the foregoing will, and thereby ordain that my wife, Ann Evans, be entitled to the sum of 200*l*. of my property, in case she should marry.' Now, to this codicil there are three witnesses; and the testator, by executing this codicil, appears to me, at that time, in as plain terms as possible, to have set up, not only the codicil, but the will. The only distinction between *Carleton v. Griffin* (d) and the present case is, that in *Carleton v. Griffin* the first will was signed, here the first will was not signed. Signing a will of lands does not, however, make it an operative instrument. To give the will in that case operation, the Court must have thought that they were entitled to consider the execution and attestation of the codicil, as giving effect not only to the codicil but to the will. The language of the codicil there was, 'not to disannul any of the former part,' and by the decision it operated not only not to disannul but to set up the former will. Now, I cannot say, that I can distinguish that case from the present; and, independently of any authority, I should have thought that there was good reason to consider, that the execution and attestation in this case applied to the whole

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(a) 12 J. B. Moo. 2; S. C., 2 Bing. 429.

(b) 16 Ves. 167.

(c) 3 Tyr. 56; S. C., 1 Cr. & M. 42.

(d) 1 Burr. 549.

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of what was on the paper. The codicil, expressly referring to the will, shews, that the intention of the testator was, that both instruments should be operative."

Mr. Bird, for a defendant.—The first codicil was not made effectual to pass real estate by the second. The decision in *Gordon v. Lord Reay* was contrary to the general impression of what the law was on the subject. It is admitted, that the decision was after most able argument. On examination, the case does not appear to determine any general proposition; but the decision was confined to the peculiar circumstances of the case before the Court. The leading case on the subject is *The Attorney-General v. Barnes (a)*. In that case, a testator made an unattested will, and afterwards made a codicil, in which he recited and took notice of the will; the codicil was duly attested; but Lord Hardwicke treated it as clear, that the will was inoperative to devise freehold lands: *Utterton v. Robins (b)*; so that the weight of authority is against sustaining the first codicil as affecting the real estate. If that case is now law, it decides the present question. It was not cited in *Gordon v. Lord Reay*; and it is not too much to suggest, that, if it had been referred to, the decision of the Vice-Chancellor in that case might have been different. All that this testator meant to say in his second codicil was, that it was a second codicil to his will and former codicil, without reference to their legal validity. As the testator expressly confirms the will, the effect is the same as if he had said exclusively, "and not confirming the codicil," which it was competent for him to do.

Mr. J. Parker and Mr. J. H. Humphry appeared for two legatees under the will.

(a) Pre. Ch. 270; S. C., 3 Ch. Rep. 150.

(b) 2 A. & E. 423; S. C., 2 Nev. & M. 821.

The VICE-CHANCELLOR remarked, that in *Doe v. Evans* (a) the will related to several descriptions of property; it was not confined to land.

After reading at length the judgment of *Bayley, B.*, in that case (b), his Honor proceeded:—

Now it can make no difference whether the codicil be written on the same paper with the will, or written at a subsequent period or not. Here a codicil is referred to, and there is no dispute what the instrument was. The second codicil commences thus, "Whereas, I, John Aaron, &c., have made and duly executed my last will and testament in writing, bearing date the 23rd day of August, 1828, and also a codicil annexed thereto, bearing date the 21st day of May, 1831." It is perfectly clear, in my opinion, what the instrument here mentioned is. If the remark is not too trifling, I observe, that in the first codicil the testator says, "I do hereby declare this present writing to be a codicil to my said will, and I do direct the same to be annexed thereto;" and turning to the second codicil, I find that the testator there says, "I do hereby declare this present writing to be a second codicil to my said will, and I do direct the same to be annexed thereto and taken as a second part thereof:" it concludes, I agree, only confirming the will; which gave rise to a very apposite observation made by *Mr. Bird*.

The intention of the second codicil, as collected from the whole of it, was to confirm the first codicil. That is done by an instrument duly attested. Now, whatever I might have thought of this question, independently of the case of *Gordon v. Lord Reay*, and the observations of *Bayley, B.*, in the case in the Exchequer, I must, if I am to decide myself without having the opinion of a Court of law, say, that the effect of the will and second codicil was to place the first codicil in the same situation as if it had

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(a) 3 Tyr. 36; S. C., 1 Cr. & M. 42. (b) As cited, ante, p. 477.

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been attested by three witnesses. I decide the question, because I am bound or requested to do so; but I should have been glad to have had the opinion of a Court of law on the point. I proceed on the ground that otherwise I should in substance be contravening those two authorities. In so deciding, I think that I am not contravening *Utterton v. Robins*.

June 28th.

GREEN v. GREEN.

A testator, by will executed in 1838, gave the residue of his real and personal estate to trustees, upon trust, to pay an annuity to his wife, and to invest the sum of 1000*l.*, and pay the interest to his son for life; and, after his decease, to any widow of his son; and, after her decease, upon trust, as to the principal, for his children; and subject to the annuity and to the above and another legacy, upon trusts expressed thus:—"In trust for all my children, in equal shares,

and the heirs of their bodies, (except as to my son J. F. G., and his children and their issue, whose share, in consequence of the 1000*l.* set apart for him and them as aforesaid, shall be rated at 1000*l.* less than the share of any other of my children); and in case there shall be a failure of issue of any of such children, then, as to the share or shares of him, her, or them, whose issue shall so fail, to the use of the others or other of them, and the several heirs of their respective bodies." The testator was possessed of freehold and leasehold property, and left J. F. G. and one other child:—*Held*, that J. F. G. was entitled in fee to half of the testator's freeholds, and absolutely to his leaseholds; that the parenthetical expression was merely explanatory, and that the 29th section of the Wills Act did not affect the devise and gift.

JOHN SIMMONS GREEN, by his will, dated the 18th day of October, 1838, gave, devised, and bequeathed the residue and remainder of his real and personal estate to Joseph Rock and William Fowler, their heirs, executors, administrators, and assigns, upon trust to convert his personal estate into money, and, after paying his debts, funeral and testamentary expenses, and legacies, upon trust, (among other things) out of the rents, dividends, and annual proceeds of his property, to pay to his wife an annuity of 100*l.*; and upon trust to invest the principal sum of 2000*l.*, and stand possessed thereof upon trust to pay the interest of 1000*l.*, part thereof, to Mary Green his daughter, for her separate use for life; and, after her decease, to any husband of his daughter, for his life; and, after his decease, upon trust, as to the principal, for the children or child of the said Mary Green; and to pay the interest of 1000*l.*, other part of the said sum of 2000*l.*, unto his son John Fowler Green, for life; and, after his decease, to pay the

same to any wife of his said son, for life; and, after her decease, upon trust, as to the principal, for the children or child of his said son, in the same manner as the 1000*l.* was given in favour of the testator's daughter and her children. The will then proceeded as follows:—"And subject to such annuity to my said wife, and the said sum of 1000*l.* in favour of my said daughter, her husband, and children as aforesaid, and the 1000*l.* set apart for my said son John Fowler Green and his issue as aforesaid, upon trust, that they my said trustees, Joseph Rock and William Fowler, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, shall and do stand possessed of the residue and remainder of my said estate and effects, according to the nature of the said estates respectively, in trust for all and every my child or children, in equal shares and proportions, and the several heirs of their respective bodies, (except as to my said son John Fowler Green and his children, and their issue, whose share, in consequence of the 1000*l.* set apart for him and them as aforesaid, shall be rated at 1000*l.* less than the share of any other of my children); and, in case there shall be a failure of issue of any of such children, then, as to the share or shares of him, her, or them, whose issue shall so fail, to the use of the others or other of them, as tenants in common, and the several heirs of their respective bodies: And, in case there shall be a failure of issue of all such children, then to the use of such one child and the heirs of his or her body. But it is my mind and will, that no child shall have a vested interest until the age of twenty-one years as to sons, at which time his share shall be conveyed over or paid to him, and daughters at the age of twenty-one years or marriage."

The testator directed, that the shares of each daughter, when vested, should be conveyed to trustees, and be invested and held under the same trusts in favour of such daughter and her husband and their issue, as the trusts relating to his daughter Mary and her husband and is-

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sue, under the bequest of the sum of 1000*l*. The testator appointed Messrs. Rock and Fowler executors of his will.

The testator died on the 28th of April, 1841, leaving John Fowler Green and Mary Green, the two children named in the will. Mary Green married Robert Baynes in 1839, and had three children.

The executors duly proved the testator's will. The testator died seised and possessed of freehold and leasehold estates, and of a surplus of personalty applicable to the trusts declared of the residue.

John Fowler Green executed a disentailing deed of all the freehold estates devised to him by his father's will in 1846. He afterwards instituted the present suit against the devisees in trust and executors of the will, and against Mr. and Mrs. Baynes and their children, praying for a partition of the freehold and leasehold estates of the testator, and for the administration of his personal estate. At the hearing, a reference was directed to the Master, who found (among other things) the facts as above stated.

The cause now came on upon further directions. The principal question that arose was, whether, under the limitations and trusts of the testator's will, the plaintiff took an estate tail in the testator's real estates, and an absolute estate in his leasehold estates, or whether he took an estate for his life only with remainder to his children, if he should have any, with remainder to Mrs. Baynes and her children.

Mr. *J. V. Prior*, for the plaintiff.—The plaintiff claims, by virtue of the will and of the disentailing deed, to be tenant in fee simple of the moiety of the real estate devised by the testator's will. He is also entitled under the will alone to the moiety of the testator's leasehold property absolutely. This would have been clear before the passing of the Wills Act of 1837. It is suggested by the defendants that that statute varied the previous rule of law. By the 29th section it is enacted, "That, in any devise or bequest

of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise." If this section could have had any application to the present case to cut down the limitation from an indefinite failure of issue to a failure of issue at the death of the plaintiff, the scope of the will shews a contrary intention, which brings it within the exception at the end of the section, "unless &c.," and thus takes this limitation out of the operation of the enactment.

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Mr. *Humphry* and Mr. *F. T. White* for Mr. and Mrs. Baynes and their children.—The parenthesis in the devise and gift of the residue, "except as to my said son John Fowler Green," &c., operated to convert the estate, which the will gave to him and the heirs of his body, from an estate tail in the plaintiff into an estate in him for life in the freehold property, with remainder to his children if he shall have any, with remainder over to Mrs. Baynes and her issue in case of the death of the plaintiff without issue.

The case as to the leasehold property is within the exception in the 29th section. It follows that, as to the freeholds and also as to the leaseholds, the plaintiff is tenant for life only.—They cited *Gee v. Audley* (a).

Mr. *Faber* for the devisees in trust and executors.

(a) 1 Cox, 325.

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Mr. *Craig* appeared for another defendant.—Even before the Wills Act, such a devise and limitation as that in the present case would not have created an estate tail: *Forth v. Chapman*(a), *Radford v. Radford*(b), and *Daintry v. Daintry*(c). The Wills Act, however, affects all such limitations as those in the present case. The first branch of the 29th section would clearly embrace the limitations in this will, and reduce the plaintiff's interest to an estate for his life with a remainder to the defendants Mrs. Baynes and her children, in case, at his death, the plaintiff should leave no issue; and it was not competent for the plaintiff to divest this remainder. The exception throws the onus on the plaintiff of shewing that the testator intended by this will to give him and his issue an estate tail. This the plaintiff cannot do; but, on the contrary, it is manifest, upon the trusts of the 1000*l.* given to the son and his children, that the testator intended an effectual trust for the defendant Mrs. Baynes, in case of the death of the plaintiff without issue then living. In the residuary limitation, this trust is referred to, so as to shew that the real intention of the testator was, to give a similar benefit as to the residue to Mrs. Baynes, in case the plaintiff should die without children. The presumption must on the whole be in favour of the defendant.

The VICE-CHANCELLOR:—

I consider the language of the parenthesis in the will as not strong enough to change the construction of the previous language. I agree, that, speaking with strict accuracy, there cannot be a bequest of personalty to a person in tail. But looking at the words of the 29th section of the Wills Act, I must decide in accordance with the prayer of the bill, that the plaintiff John Fowler Green is entitled in fee to half of the freeholds, and that he is entitled absolutely to half of the leaseholds; and there must be a decree for partition as prayed.

(a) 1 P. Wms. 603. (b) 1 Keen. 486. (c) 6 T. R. 307.

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Ex parte HAYS,

In the Matter of ELIZABETH MARY HAYS, an Infant.

July 6th.

THIS was the petition of an infant and her father for maintenance out of capital. There was no suit instituted.

At the time of the marriage of the infant's father and mother, the latter was absolutely entitled to one-fourth part of a sum of 3000*l.* assured in the Equitable Assurance Society on the life of her father.

By a settlement executed previously to her marriage, she assigned all her interest in the policy upon trust, as and when the monies payable under the policy should become due, to call in and invest the same in the names of the trustees in real or government securities, and to pay the interest thereof to the mother for her life for her separate use; and, after her death, to pay the same to the father until he should become bankrupt or insolvent, or incur the growing payments thereof, or depart this life; and after the happening of any of the said events, upon trust to pay or transfer the trust funds unto and amongst all and every the children of the marriage; and, if there should be but one child, then the whole to such one child; the shares of sons to be payable at twenty-one, and the shares of daughters at that age or on marriage, which should first happen, and to be vested at such period.

The settlement contained a power of maintenance after the death of the parents; and a power to raise and apply, for or towards the preferment or advancement or establishment, or in any other manner for the benefit, of the child or children whose portion or portions should not have actually become payable, any sum of money not exceeding one-half part or share of his, her, or their presumptive portion or portions. The trusts, in the event of no child attaining twenty-one, or being a daughter attaining that age or

A bonus on a policy settled on trusts, under which an infant was entitled contingently on attaining twenty-one, directed, on petition without suit, to be anticipated and applied for maintenance of the infant.

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marrying, and of the husband surviving his wife, were for the next of kin of the wife according to the Statute of Distribution, exclusive of her husband.

In December, 1839, a bonus of 1140*l.* was declared in respect of the one-fourth interest in the policy.

In 1842, pursuant to a power contained in the settlement, the trustees had, by the surrender to the office of the sum of 600*l.*, part of the bonus of 1140*l.*, raised 500*l.* for the separate use of the mother. The mother died in 1844, having by her will appointed and bequeathed all her interest under the settlement to her husband, and made him her sole executor.

The infant was the only issue of the marriage. The father was in extremely indigent circumstances, and not of ability to provide a home for or maintain or educate the infant.

It had been ascertained that the assurance office would pay in advance to the trustees 437*l.*, as the present value of the sum of 540*l.*; but the trustees were unwilling to make such surrender without the sanction of the Court.

The prayer was, that the trustees might be at liberty to surrender the remaining bonus to the office, and receive the sum of 437*l.* for the same; and, the father being willing and thereby expressly consenting to forego all his life interest under the settlement in the said 437*l.*, that the trustees might, from time to time, apply for the maintenance and education of the infant so much of the principal sum of 437*l.*, or of the stocks, funds, and securities in which the same should be invested, as, together with interest and dividends to accrue thereon, would make up the sum of 50*l.* in every year, until, by the death of the said John Hays, the one-fourth part of the principal sum assured should become payable, and be paid by the office to the trustees of the settlement.

Mr. *Grenside*, for the petitioner, cited *Ex parte Cham-*

bers (a), *Ex parte Swift* (b), *Ex parte Green* (c), and *Ex parte Whitfield* (d).

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The VICE-CHANCELLOR:—

The difficulty which I feel in the case is as to my authority to make an order on petition for the realisation of the addition or bonus in question; and whether such an order would not amount to an administration of the trusts without a suit. The application may be very reasonable; but the question is, whether the Court is not asked to go a step further than it has ever yet gone without a suit. Could it order a sale of the infant's reversionary property?

Mr. Grenside.—The Court always exercised jurisdiction, without a bill, to apply infants' property for their maintenance and education and advancement, in such manner as it considered most beneficial, and has, for this purpose, broken into the capital of the infant, where the urgency of the case required it. In the same summary way it may direct or permit an interest of this description to be realised at once, and applied for the maintenance of the infant.

It was also stated at the bar, that the father was about to emigrate immediately to Australia.

Mr. Fisher consented for the trustees.

The VICE-CHANCELLOR, after some hesitation, made an order in accordance with the prayer, and without a reference; but required as a condition, that the father should forego all his life-interest under the settlement, as well in the one-fourth of the sum assured as in the addition. And

(a) 1 Russ. & My. 577.

(c) 1 J. & W. 253.

(b) 1 Russ. & My. 575.

(d) 2 Atk. 315.

1849.

Ex parte
HAYS,
In re HAYS.

an affidavit was to be produced to the Registrar verifying the statement of the father's being about to emigrate to Australia.

*July 11th,
13th, & 14th.*

After the passing of the Act, 6 & 7 Vict.

c. 85, two (of four) trustees of a charity, who were defendants to an information complaining of acts of mismanagement, were examined in chief, by mistake, as witnesses, by the relator, without any order for that purpose, instead of being cross-examined. The relator did not tender the depositions in evidence:—

Held, that, by reason of their examination, no decree could be made against them.

Held, also, that the 32nd Order of August, 1841, did not, in such circumstances, entitle the relator to relief against the remaining trustees.

On a motion made on behalf of the relator,

after the cause had been argued, to suppress the depositions of the trustees, it was ordered that they should be suppressed, on the relator entering into admissions, and on the defendants' being permitted to add to their evidence; but, on appeal, the order was discharged, the Lord Chancellor being of opinion, that, even on these terms, the relator could not be relieved from the mistake.

ATTORNEY-GENERAL v. DEW.

THIS was an information against Tomkyns Dew, John Samuel Gowland, Thomas Delahay, and Daniel Henry Lee Warner, the four trustees of a charity called "The Peterchurch Charity" in Herefordshire, founded by the will of one John Smith in 1722, alleging various breaches of trust and misconduct on the part of the defendant Dew in the management of the charity property; and stating, that the other trustees had never interfered to correct or prevent the acts of mismanagement complained of. The prayer was for an account of the rents and profits of the estates and property belonging to the charity, which had been received by the four trustees, or any or either of them, or which they might have received without their wilful neglect or default respectively, since the time when they were appointed trustees, and of their application thereof; and that they might be personally charged with all sums misapplied by them, with interest thereon; that the several acts of mismanagement thereinbefore set forth, might be declared to be contrary to the trusts of the charity; that all necessary inquiries might be directed into such acts of mismanagement, and respecting the management of the estate and effects, and the income of the charity since the defendants were appointed trustees; that proper directions might be given for the purpose of preventing and correcting the same; that all the four defendants

Stokes v. Trumpher 2 May V.S. 247.
Evans v. Coventry S.D.M. 4g. 8/12.

might be removed from being trustees, and that new trustees might be appointed; and for a receiver.

The cause now came on to be heard; and it appeared that the relator had examined, as witnesses, the defendants Mr. Gowland and Mr. Warner, without having obtained any order for that purpose, and without their consent, and also without withdrawing the replication.

These defendants had also been examined in chief on behalf of their codefendant Mr. Dew, who had obtained an order for that purpose. It was mentioned, in explanation, that their examination in chief for the relator arose from a mistake, the intention having been to cross-examine them only.

On the cause for the relator being opened by Mr. *Russell*, Mr. *Malins*, and Mr. *Wray*:

Mr. *Kenyon Parker* and Mr. *Stinton*, for the defendants who had been examined, took a preliminary objection, that, by such examination, all relief against those defendants had been waived. They cited *Thompson v. Harrison* (a), *Bernal v. Marquis of Donegal* (b), *Lautour v. Holcombe* (c), *Champion v. Champion* (d), *Smith v. Smith* (e).

Mr. *Russell*, Mr. *Malins*, and Mr. *Wray*, for the relator.—The cases cited do not apply. In those cases the defendants had been regularly and deliberately examined. In the present case their examination was a mere slip and a mistake on the part of the commissioner. They could not have been examined without an order of the Court; and it would be impossible to read their examinations in evidence, or to support an indictment for perjury upon the testimony so given. The examination was a nullity;

(a) 1 Cox, 344.

(b) 3 Dow, 138; and *S. C.*, 1 Bligh, N. S., 594.

(c) 8 Sim. 76.

(d) 15 Sim. 101.

(e) 6 Hare, 524; and see *Rowland v. Witherdon*, heard before Lord Chancellor *Truro*, and intended to be reported in 3 Macnaghten & Gordon's Reports.

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and the case must be treated as if there had been none. Even if an order had been obtained, it would have been irregular, as the replication was not withdrawn: *Holmes v. Corporation of Arundel* (a). Moreover, the cases cited were suits by bill and not by information.

The VICE-CHANCELLOR:—

There are some remarks of more or less weight, which it may be as well that I should make at the outset in disposing of this case.

One is, that all the witnesses who have been examined in this suit, have been examined either for the informant or for the defendant Mr. Dew. Neither the defendant Mr. Gowland, nor the defendant Mr. Lee Warner, has entered into any evidence, nor (as I understand the matter) had they anything whatever to do with the selection or appointment of the commissioner.

The other is, that (as I also understand the matter) no application has ever been made to this Court for the purpose of expunging or suppressing wholly or in part the depositions of either of those two gentlemen.

Having said so much, I agree in the representation that has been made of the general rule, that a plaintiff examining a defendant as a witness waives all title to a decree against that defendant, and generally, or universally, pays his costs. The rule may possibly not be without exception; as for instance, there may be a merely formal defendant who disputes nothing, or has nothing to dispute about; and yet it may be necessary to make some kind of decree in form against him, that is, to direct something with which he has a concern, but which he does not dispute, and in which he has no interest. In such a case, it may not be necessary to dismiss the bill against him. That is, how-

(a) 4 Beav. 155.

ever, a description which it is impossible to apply to the present case, either as to Mr. Lee Warner or as to Mr. Gowland. I think that they come within the operation of the general rule, unless they are excluded from it, or it is made not applicable to them, by any of the considerations to which I am about to refer.

I may mention, first, that to which Mr. *Russell* alluded, and to which I had been addressing my own attention some time before, namely, that this is a suit by information and not by bill. I apprehend, however, that the same rule must apply, and that there is no ground for the distinction suggested.

It has been said, that the evidence of neither of these gentlemen has been read or tendered. That I apprehend also makes no difference.

It has then been said, that the evidence has been irregularly taken, because they were examined without an order, and because there was a replication to their answer; and it is therefore suggested, among other things, that an indictment for perjury could not be maintained. Upon the question of the indictment, I decline to decide; because it has, I think, no bearing upon the point of which I have to dispose. The absence of an order may make the evidence irregular—the existence of a replication may also make it irregular; but neither is the existence of a replication, nor is the absence of an order material now. These gentlemen have in fact been examined against themselves, because they have been examined as the witnesses of the informant, the whole of whose evidence was directed against all the defendants. It may be, that they might have declined to be examined—that they might have resisted it. I think that they were not bound to decline, that they were not bound to resist. That circumstance alone does not vary the case.

I am of opinion, and I so decide, although unwillingly,

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that this case is not taken out of the operation of the general rule, and that no decree whatsoever can be taken against either of these defendants.

It must then be considered, whether I am bound to give them their costs; and it must also be considered how far the circumstance, that I think it impossible to make a decree against them, affects the case, as between the informant and the other two defendants (a).

Mr. *Russell*, Mr. *Malins*, and Mr. *Wray* contended, that, under the 32nd Order of August, 1841, a decree could be made against Mr. Dew and Mr. Delahay alone.

Mr. *Wigram* and Mr. *W. Rudall* for Mr. Dew, contended, that the new Order did not apply to the case.

The VICE-CHANCELLOR:—

The 32nd Order of August, 1841, provides, “that in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.” Here, however, the suit cannot be considered to have been constructed with that aspect. It was instituted against Mr. Dew, upon the principle of having all persons liable, as well as himself, before the Court. The information also asks, that he may be dismissed from the trusteeship.

I think that, upon the whole, there is too much difficulty to enable the Court to proceed at all against Mr.

(a) See *Thompson v. Harrison*, 1 Cox, 344; *O’Keefe v. Gould*, 1 Beat. 356; *Burnett v. Donegal*, 3 Dow, 138; *Champion v. Champion*, 15 Sim. 101; *Fussell v. Elwin*, 7 Hare, 20.

Dew; and the difficulty is the same with regard to Mr. Delahay. I must give the costs of such of the trustees as have been examined; and with regard to the two other trustees, this suit fails as to them by an act of the relator, to which I must consider them as strangers; therefore, equal justice compels me to dismiss the information with costs, but without prejudice to another suit.

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Mr. *Russell* asked leave to give notice of motion to suppress the depositions; and that the cause might not be finally disposed of until that motion had been heard.

The VICE-CHANCELLOR gave the leave sought.

On this day, accordingly,

Mr. *Russell*, Mr. *Malins*, and Mr. *Wray* moved, that the depositions might be suppressed. They read affidavits, to shew that the examination in chief was entirely the result of mistake on the part of the clerk conducting the matter, and of the commissioner, who ought not to have taken the examination without an order of the Court. They cited *Barden v. Gorman* (a) and *Massey v. Massey* (b), as shewing, that, in a case of this description, the Court would suppress depositions. July 14th.

[The VICE-CHANCELLOR said, that Sir *A. Hart's* knowledge of the practice of the Court was very great. His Honor observed, that, in this case, leave to give notice of motion had not been granted till the cause was in substance disposed of.]

Mr. *Russell*.—The commissioner, an officer of the Court,

(a) 2 Moll. 576.

(b) 4 Beat. 358.

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participated in the irregularity. The strict rules of pleading and practice are relaxed in charity cases. Thus, a decree may be corrected on the petition of the Attorney-General, without a rehearing; and it may fairly be inferred from the cases, that relief will be afforded against a mere slip in such a case, if it can be done without altering the position of other parties.

[The VICE-CHANCELLOR.—I could not suppress the depositions except on the terms of the relator admitting the substance of the evidence contained in them; nor without giving the defendants an opportunity, if they should desire it, of going into further evidence. Perhaps the defendants will not object to their suppression on these terms.]

Mr. *K. Parker* and Mr. *Stinton* for the defendants who had been examined.—There is no excuse for the alleged mistake, if mistake there was, for the examination lasted thirty days; and there was abundance of time for the relator to be well advised as to the course which he ought to take, and to cross-examine the witnesses if he thought fit. No case has ever occurred in which an application has been acceded to, to suppress depositions after the hearing of a cause: *Whitlock v. Baker* (a).

Mr. *Wigram* and Mr. *W. Rudall*, for the defendant Dew. When the depositions were taken, Mr. Dew was aware that the replication had been filed. When, therefore, he became aware that the relator had examined his codefendants as witnesses, he knew that no decree could be made against them, and consequently none against him. He, therefore, might properly act on that knowledge, and forbear supporting his own case by evidence; and the Court cannot relieve him from the consequences of that state of things,

should it take upon itself to change it. [The *Vice-Chancellor* observed, that the relator had examined nearly forty witnesses.] We examined thirty-six in opposition to sixty-four, *ex abundanti cautela*. But it is sufficient to say, that the course taken by the relator may have altered ours, to shew that the Court cannot restore the parties to the position in which they would have been, if this step had not been taken. The relator must, therefore, take the consequences of his error, if it was one.

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THE VICE-CHANCELLOR.—What can you require beyond liberty to examine as many new witnesses as you think fit?

Mr. Wigram.—We do not ask that permission, for we think it would be contrary to the practice of the Court.

THE VICE-CHANCELLOR.—

The depositions in question were irregularly taken; though the irregularity, it is true, was that of the commissioner and relator, or of the relator only. But, moreover, Mr. Gowland and Mr. Lee Warner were examined as witnesses on the part of the defendant Mr. Dew, and therefore against the information, and I suppose regularly so examined.

As I infer also, Mr. Gowland's examination for Mr. Dew was commenced, if not concluded, before his examination for the information commenced; and Mr. Lee Warner's examination, moreover, for Mr. Dew, as I likewise infer, was commenced, if not concluded, before Mr. Lee Warner's examination for the information commenced.

Neither I believe appears to have been subpoenaed, or requested to attend at the place of examination on the part of the Attorney-General or relator. And I cannot but attribute to error and want of knowledge, and to no de-

2 *Kearney* & *S.* 247.

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DEW.

sign or intention of abandoning the case against Mr. Gowland or Mr. Lee Warner, that they were examined as they were in chief in support of the information; in support of which they might have been, as Mr. Dew's witnesses, cross-examined.

In a state of things such as this, their depositions in chief on the part of the Attorney-General or relator may well, I think, be suppressed on the present motion. But the relator must pay the costs of it, and all costs that have been occasioned by the depositions to be suppressed; and admissions must, on the part of the Attorney-General and relator, be entered into. These admissions to be of the facts stated in those depositions, and to be as to the whole, or separately as to any one or more of the facts used at the hearing of the cause in support of the defence, at the option of the defendants respectively; and the defendants, if they ask it respectively, may enter into fresh evidence.

An order was made accordingly; but, on appeal to the Lord Chancellor (Lord *Cottenham*), his Lordship thought the relator not entitled, even on the above terms, to suppress the depositions, and discharged the order.

1849.

July 12th.

TURNER v. MAULE.

THIS was a suit instituted by persons claiming to be some of the next of kin of an intestate named John Turner. No next of kin having made any claim for several years after the intestate's decease, and there being standing in the intestate's name 57,000*l.* Three per Cents., Mr. Maule, the Secretary to the Treasury, took out administration to the intestate; and, after ineffectual inquiries for the next of kin, had sold out the fund in 1845, and paid the proceeds into the Treasury. Inquiries were directed by the decree as to the next of kin, and at the trial of an issue (a) a verdict had been found in favour of the plaintiffs and some of the defendants. The cause now came on for further directions; and a question was raised, whether the defendant Mr. Maule must pay interest upon the amount produced by the sale of the stock from the time of its transfer to the Treasury?

An intestate had stock in the funds to a very large amount. No next of kin appeared to claim administration, which was taken out by the Solicitor to the Treasury. The administrator, after several years had elapsed without any claim being substantiated, sold out the fund, and paid the proceeds into the Treasury. Afterwards, the next of kin appeared and substantiated their title in a suit in Chancery:—*Held*, that the administrator, on paying over to them the proceeds of the stock, must also pay interest at 4*l.* per cent. from the time when the stock was sold out.

Mr. *Wigram* and Mr. *Freeling*, for the next of kin, contended, that Mr. Maule was in the same position as any other administrator, and must replace the fund, with interest at 4*l.* per cent.

Mr. *Wray*, for Mr. Maule, submitted, that the case was a peculiar one; and that, by the neglect of the next of kin to come forward, and the obscurity and difficulty which the intestate himself had created by using a different Christian name from that by which he had, as the jury had found, been baptized, the administrator was perfectly justified in the course which he had taken, and, as he had made no interest by the fund, ought not to pay any. The case was like that of unclaimed dividends which were

(a) See Ante, Vol. 2, p. 209.

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taken by the Crown, and upon which no interest was paid, the Crown retaining the interest, or using the money as compensation for taking care of it, as was done, in fact, by bankers. The plaintiffs were not entitled, either in respect of contract or otherwise, to interest.

The VICE-CHANCELLOR:

I understand the facts to be these: An intestate had stock in the Funds. His administrator, without any necessity arising in the course of the administration of the estate, sold the stock; and then, without any judicial decision, authority, or investigation, paid it over to those whom the administrator considered entitled. However correct the views of the administrator were in thus acting, the persons entitled to the fund ought not to suffer by the proceeding. I think that he must replace the sum produced by the sale, with interest at 4l. per cent.

July 12th &
 18th.

Where a defendant moves to suppress any of the depositions taken on behalf of the plaintiff, the co-defendants need not be served with notice of the motion.

BARNARD v. PAPINEAU.

MR. SCHOMBERG, for a defendant named Papineau, moved to suppress the depositions of a witness named Columbine, who had been examined on behalf of the plaintiff. Mr. Columbine, on his cross-examination, said, the several matters to which he had deposed in his examination in chief had come to his knowledge by reason of his having been professionally concerned for Mr. Papineau. On this ground it was sought to suppress his examination in chief.

Mr. Russell and Mr. J. Parker, for the plaintiffs, objected, that the other defendants ought to be served.

The VICE-CHANCELLOR said, he doubted whether the other defendants ought not to be served, as they might de-

sire to read the depositions taken on the part of the plaintiffs, although the plaintiffs themselves might not.

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BARNARD
v.
PAPINEAU.

The case stood over for the practice to be inquired into.

The VICE-CHANCELLOR, on this day, said, that he had consulted the Master of the Rolls and Sir *James Wigram*, who were of opinion that the codefendants need not be served.

July 18th.

ROBINSON v. GELDARD.

July 14th.

THIS was an administration suit. The testator Thomas Clapham by his will bequeathed to the treasurer of the General Infirmary at Leeds 10,000*l.*, to be raised and paid out of such of his ready monies, goods, and personal effects, as he might or could by law charge with the payment of the same. He also gave 10,000*l.* to the Yorkshire School for the Blind, 5000*l.* to the Bath Hospital at Harrogate, and 5000*l.* to the Society for the Relief of Widows and Orphans and Distressed Families of Clergymen in the several Deaneries of York and Craven; all these legacies were directed to "be raised and paid in manner aforesaid." There were other legacies not charitable, to the amount of 36,000*l.* The whole personalty was more than sufficient for the payment of the debts, funeral and testamentary expenses, and legacies; but, if the debts, funeral and testamentary expenses, and legacies, not charitable, were paid rateably out of all the different descriptions of personalty, enough pure personalty would not remain to pay the charitable bequests in full.

A testator gave pecuniary legacies to charities, and directed them to be paid out of such of his ready money, goods, and personal effects, as he might, by law, charge with the payment of the same:—
Held, not sufficient to throw the debts, funeral and testamentary expenses, and debts and legacies not charitable on the mixed personalty, so as to leave the pure personalty for the charitable legacies.

and. 3 A.C. 2 G. 7.

The question was, whether the debts, and funeral and testamentary expenses, must not be apportioned and paid out of the pure personalty and personalty savouring of the

Trusts of the Property of the Testator &c. 316

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reality, rateably, and the charitable legacies abate in the same proportion; or whether, under the above bequests, the pure personalty was not primarily applicable to the payment of the legacies to charities.

Mr. *Wigram* and Mr. *Headlam* were for the plaintiffs.

Mr. *Russell* and Mr. *Willcock* for the next of kin.—It is not enough for a testator to direct a charitable legacy to be paid, even exclusively, out of his pure personalty, unless he also directs his debts, funeral and testamentary expenses, and general legacies, to be primarily paid out of the mixed personalty. But here the legacies are not even made exclusively payable out of the pure personalty. The general rule therefore applies, and they must abate. The other payments must be made out of every part of the personal estate pro ratâ. To throw them upon any part of the personalty exclusively, would be, in effect, marshalling in favour of charity, which is contrary to the authorities: *Philanthropic Society v. Kemp* (a) and *Sturge v. Dimsdale* (b).

Mr. *J. Parker*, Mr. *Malins*, Mr. *Roundell Palmer*, Mr. *Borton*, and Mr. *Rasch* were for the defendants representing the charities.

The VICE CHANCELLOR:—

Had it not been for the recent decisions at the Rolls, which have been referred to, I might, possibly, have thought that, consistently with all the modern decisions, the debts, and funeral and testamentary expenses, might be borne by the different descriptions of personalty pro ratâ; and that then the mere personalty should be applied, in the first instance, under the directions of this particular will, in payment of the charity legacies. But I should,

(a) 4 Beav. 581.

(b) 6 Beav. 462.

by acceding to the argument in favour of the charities, be acting against the opinion which is the foundation of the judgment in *Sturge v. Dimsdale*.

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ROBINSON
v.
GRIFFARD.

The following were the terms of the decree as regarded the charities:—

And it is ordered, that the said Master (having regard to the previous directions) do ascertain the respective amounts of the pure personal estate, and of the personal estate savouring of realty: And it is ordered, that the said Master do apportion the costs and all sums paid for funeral and testamentary expenses and debts between the pure personal estate and the personal estate savouring of realty, rateably: And this Court doth declare, that the charitable legacies given by the will of the said testator ought to abate in the proportion that the part of the testator's personal estate savouring of realty bears to the whole personal estate: And it is ordered, that the said Master do inquire and state to the Court what is payable for principal and interest upon the several charitable legacies (having regard to the previous declaration); and compute interest to the date of his report upon the respective amounts of such portions of such legacies.

1849.

*July 13th,
14th, & 19th.*

A testatrix devised copyholds to A., subject to the payment of 400*l.* to a legatee. The legatee's husband attested the execution of the will. The devisee sold to a purchaser for the full value of the estate, both parties treating the legacy as void, and not noticing it in the conveyance. The purchaser afterwards resold:—*Held*, that the legatee had no remedy in equity against the devisee, to recover from him, personally, the amount of his legacy.

JILLARD v. EDGAR.

THIS was a suit instituted by the representatives of a legatee, under the will of Mrs. Martha Butt, seeking to enforce payment of the legacy, against a devisee under the same will.

By the will, dated the 6th of July, 1821, the testatrix devised unto Edward Hawkins copyhold hereditaments, held of the manor of Gillingham in Dorsetshire, to hold the same unto the said Edward Hawkins and his assigns for his life; and from and immediately after his decease, she devised and bequeathed the same hereditaments unto her nephew, the defendant Joseph Edgar, to hold the same to him, his heirs, and assigns, for ever, "but subject to the payment of the sum of 400*l.*," within three years from the time of the decease of the said Edward Hawkins, unto the testatrix's niece Elizabeth Dowding, her executors, administrators, or assigns; and she appointed Elizabeth Dowding and Joseph Edgar her executrix and executor.

The will was attested by three witnesses, one of them being the husband of the legatee Elizabeth Dowding; it was admitted that he had attested the will at the request of the devisee Joseph Edgar. Joseph Edgar alone proved the will.

Joseph Edgar purchased the estate of Edward Hawkins, the tenant for life, for 160*l.*; and he paid 115*l.* to the testatrix's customary heir, John Ryall, in respect of any estate which the latter might have by reason of the attestation of the will by Mrs. Dowding's husband, which was supposed to affect its validity. These purchases were completed by John Ryall and Edward Hawkins (the former of whom was described in the surrender as claiming some interest as heir,) surrendering the copyhold hereditaments to Joseph Edgar and his heirs.

Joseph Edgar was thereupon admitted tenant in fee.

In January, 1829, Joseph Edgar sold the copyhold hereditaments to Louis George Saint Lo for 600*l.*, no deduction or abatement being made of or from the purchase-money on account of the copyhold hereditaments being charged with the legacy of 400*l.* It was no part of the agreement that the purchaser should take upon himself the payment of the 400*l.*, or that the copyhold hereditaments should remain charged with the legacy, the solicitors for the vendor and purchaser concurring, at the time of the sale, in the opinion, that the copyholds were not well charged with the 400*l.* It was stated, by the answer of the devisee, that the 600*l.* purchase-money had been applied in payment of the testatrix's debts.

The purchaser, Mr. Saint Lo, afterwards sold the property to Mr. Edward Burrigge and Mr. Richard Downs, the latter of whom subsequently purchased the share of the former.

On the 26th of April, 1844, Edward Hawkins died.

Afterwards, the legatee Elizabeth Dowding died, having appointed the plaintiff her executor.

The bill prayed, that Joseph Edgar and Richard Downs might be declared liable to pay what should be found due in respect of the legacy of 400*l.*, and interest from the 26th of April, 1847, and might be ordered to pay the same; and that the amount might be declared to be a charge on the copyholds; and that the copyholds might be sold.

The defendant Joseph Edgar, by his answer, submitted that he was not liable to pay the 400*l.*, inasmuch as he was not, on the 26th of April, 1847, and had never since been, and was not then seised or possessed of the estate; and he further alleged, that the plaintiff had received the legacy from the defendant Downs, the purchaser of the estate.

The defendant Downs's answer (which was not replied

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v.
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EDGAR.

to) denied notice of the charge, and admitted that he had refused to pay, and had not paid, the legacy.

In support of the allegation in the answer of the defendant Edgar, a witness named Thomas Dowding deposed that Downs had, through his solicitors, paid the 400*l.* to the plaintiff; and that a deed was executed on the occasion releasing the charge, as the deponent (who was the attesting witness to it) understood.

Mr. *Wigram* and Mr. *Shapter* opened the cause on behalf of the plaintiff; and, among the evidence, they tendered the deed of release mentioned in Thomas Dowding's deposition, with his affidavit as the attesting witness. The plaintiff's object in producing this deed, which was dated 4th of January, 1848, was to shew, by its recitals, that the solicitors of Downs had paid the money to the plaintiff on their own account, and not in satisfaction of or so as to extinguish the charge, but upon the terms that they, the solicitors, might proceed against Edgar in the name of the plaintiff, in order that what should be recovered should be applied to repay them what they had paid to the plaintiff, and that any surplus should be applied to the plaintiff's own use.

Mr. *Russell* and Mr. *Berrey* objected to the reception of this evidence, as not bearing upon any question put in issue by the bill.

The VICE-CHANCELLOR reserved the point.

Mr. *Wigram* and Mr. *Shapter*.—In the first place, it was a mistake to suppose that the will or the legacy was invalid: *Emanuel v. Constable* (a), *Foster v. Ban-*

(a) 3 Addams, 210; 3 Russ. 436.

bury (a), *Doe v. Mills* (b), *Doe v. Danvers* (c), *Hatfield v. Thorp* (d).

The words of the will rendered the defendant Edgar personally liable: *Doe v. Snelling* (e). And this personal remedy is consistent with the remedy against the land: *Messenger v. Andrews* (f), *Aynsley v. Wordsworth* (g).

But the case falls completely within the authority of *Newman v. Kent* (h), where a testator devised copyholds to one brother for life, with remainder to another brother in fee, subject to and charged with the payment of legacies within six months after the remainder-man came into possession. After the remainder-man came into possession, he sold, and one of the unpaid legatees instituted a suit against him, the purchaser, and a mortgagee from the purchaser. Sir *W. Grant* there said, that if the remainder-man had sold, and obtained the money as if no legacy had been charged, and put the money raised into his pocket, he ought ultimately to pay. Sir *W. Grant* added, that if there was any doubt whether or not the remainder-man had received the money, there might be an inquiry as to that fact; but that it would be the grossest injustice to let him go away with the whole: and the decree was for payment of the legacy, interest, and costs against the purchaser, and a decree over for them against the remainder-man. It is true, that the bill was on appeal dismissed as against the remainder-man; but this must have been owing to a circumstance not appearing upon the report in *Merivale*, viz., that the remainder-man, by his answer, to which no replication was filed, stated, that he had sold subject to the legacy. Therefore, the result of the appeal does not affect the authority of the propositions laid down by Sir *W. Grant*.

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(a) 3 Sim. 40.

(b) 1 Moo. & M. 288.

(c) 7 East, 209.

(d) 5 B. & Ald. 589.

(e) 5 East, 87.

(f) 4 Russ. 478.

(g) 2 V. & B. 331.

(h) 1 Mer. 240. See the decree,
post, p. 510.

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They also cited *Attorney-General v. Christ's Hospital* (a), *Edwards v. Freeman* (b), *Evelyn v. Evelyn* (c), *Attorney-General v. Andrew* (d), *Lechmere v. Charlton* (e).

Mr. *Rogers* appeared for the purchaser.

Mr. *Russell* and Mr. *Berrey*, for the defendant *Edgar*, among other evidence, read the deposition as to the 400*l.* having been paid to the plaintiff.

Mr. *Wigram* then insisted on the deed being admitted in evidence.

Mr. *Russell* objected, that the terms of the deed were not in issue.

The VICE-CHANCELLOR held, that the deed was admissible as part of, and for the purpose of explaining, the transaction.

Mr. *Russell* proceeded to argue the general question, and contended, that in *Newman v. Kent* the reversal of Sir *W. Grant's* decision as to the remainder-man had not been shewn to have proceeded on the ground suggested.

The VICE-CHANCELLOR.—Sir *W. Grant*, if we are to trust the report, must have thought, that if the devisee had fraudulently concealed the existence of the charge, he would have been liable. I am not satisfied that Lord *Eldon* dissented from that proposition.

Mr. *Russell* and Mr. *Berrey*.—The fact of there having been no concealment here prevents the authority from having any application to the present case. Moreover,

(a) 3 Bro. C. C. 165.
(b) 2 P. Wms. 435.
(c) 2 P. Wms. 659.

(d) 3 Ves. 633.
(e) 15 Ves. 193.

the evidence shews, that the legacy has been paid, and therefore the plaintiff has no claim.

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EDGAR.

Mr. *Wigram*, in reply.—If by the misconduct of the defendant Edgar the legatee has been deprived of her charge upon the estate, he must be personally liable to her for the amount.

The VICE-CHANCELLOR.—If he fraudulently concealed the charge, he may perhaps be liable; but is it the same thing, where all parties were aware of the charge, but supposed it to be a nullity? In such circumstances, is not your case merely that Mr. Edgar received money to the use of the legatee?

Mr. *Wigram*.—It amounts to concealment, if the charge is not noticed in the conveyance. It is very possible, that the last purchaser may have relied on the previous investigation of the title and made no inquiry, and had, therefore, no notice of the will; and if Mr. Edgar conveyed so as to enable a future purchaser to avoid notice of the charge, he must be liable. Moreover, the will makes him liable personally by its very terms. As to the alleged payment, the whole of the evidence, including the deed, shews, that, if there has been any, it has been by way merely of a purchase of a part of the charge, with liberty to use the vendor's name in enforcing it.—*Wigg v. Wigg* (a), *Goodtitle v. Maddern* (b), and *Chitty on Contracts*, p. 447, were also referred to.

The VICE-CHANCELLOR:—

I have considered, as I wished to have an opportunity of doing, the will of the original testatrix in this cause, the pleadings, and the evidence, including the deed of Janu-

July 19th.

(a) 1 Atk. 382.

(b) 4 East, 496.

1849.
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 v.
 EDGAR.

ary, 1848; and Mr. *Swanston* having favoured me with his note of Lord *Eldon's* observations and judgment on the appeal in *Newman v. Kent*, I have read that also attentively, as well as his order, and the previous decree in the Registrar's Book.

With regard to the construction of Mrs. Butt's will, worded as it is, I am not aware of any authority of which it can be in contravention to decide as I do decide, that, though it charged the copyhold estate devised to the defendant Mr. Edgar with the 400*l.* in question, it did not charge him personally with that sum; and that his acceptance of the devise did not render him personally liable to pay it to Mrs. Dowding or her executor when the appointed time of payment arrived.

I may, as to this point, refer to *Dennd. Mellor v. Moor* (a), *Doe d. Briscoe v. Clarke* (b), and *Roe v. Daw* (c), adding, that I read the word "subject" in the gift in question, as connected and agreeing with the word "hereditaments." Whether, if "subject" were read as connected and agreeing with "my said nephew, his heirs and assigns," it would make any difference, I give no opinion.

I have next thought it right to form a judgment on the question, whether, from the materials before me, it is, as between the plaintiff and Mr. Edgar, to be collected or inferred, that, assuming the 400*l.* never to have been wholly or in part satisfied to Mrs. Dowding or her executor, the devised copyhold estate has continued and remains, or, if not discharged by Mrs. Dowding or her executor, would have continued and yet remains liable, in her or his favour, to that sum. And I have come to the conclusion that it is to be so collected or inferred; for whatever may be the effect of the pleadings between the plaintiff and the defendant Mr. Downs,—whatever may have taken place be-

(a) 5 T. R. 558; 1 B. & P. 558; (c) 3 M. & Selw. 525. And see 2 B. & P. 247; 7 Bro. P. C. 607. *Andrew v. Southouse*, 5 T. R. 292.
 (b) 2 B. & P. N. R. 343.

tween them, I have found it impossible to believe, and impossible, as between the plaintiff and Mr. Edgar, to say, that Mr. Saint Lo or Mr. Edward Burridge was, or that Mr. Downs is, a purchaser without notice of Mrs. Butt's will. I have then had to ask myself, whether (subject or not subject to the postponement prescribed by her of the payment of the 400*l.*) it is proved, or probable, or ought to be taken, that the purchase-money paid by Mr. Saint Lo was wholly or to any extent received by the defendant Mr. Edgar for the use of Mrs. Dowding, or as a trustee for her; and I have been unable to answer that question in the affirmative. I believe the whole transaction between Mr. Edgar and Mr. Saint Lo to have been conducted and completed, though with notice of the existence and contents of the will on both sides, yet without any intention upon the part of the former to recognise the 400*l.* as a charge on the estate or purchase-money, or to apply or hold any part of the purchase-money to her use; and without any idea on the part of Mr. Saint Lo, either that he or Mr. Edgar held or would hold the estate incumbered with the charge, or that Mrs. Dowding had any enforceable claim in respect of it.

Did Mr. Edgar, in selling the estate to Mr. Saint Lo, commit any fraud on Mrs. Dowding, or any wrong towards her? I cannot say that he did; nor is it clear to me, that, upon the footing of having to account to her at some time for two-thirds of the purchase-money, he would have sold or been willing to sell at all.

Whether, assuming or not assuming the correctness of the report of *Newman v. Kent*, contained *ex relatione* in one of Mr. Merivale's volumes, I am not satisfied that I am differing from the great authority of Sir W. Grant, when I say, that under a will, and in circumstances such as those before me, Mrs. Dowding, in my opinion, had not a right of election between the estate and Mr. Edgar after the sale, or to hold both simultaneously liable to her.

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Certainly, moreover, I am not convinced, that, supposing Mr. Downs or the estate not discharged by Mrs. Dowding or by the plaintiff's act, Mr. Downs could call on Mr. Edgar in this or any other suit to pay the 400*l.* as between them, or to indemnify Mr. Downs against the charge, there having been, so far as I am aware, no fraud committed upon Mr. Saint Lo by Mr. Edgar.

To these considerations being added the abandonment, I suppose the unavoidable abandonment, of the case as against Mr. Downs by the plaintiff's counsel at the bar (though the bill expressly seeks to charge both defendants), and the transaction of January, 1848, (I mean, of course, the deed proved on the plaintiff's behalf, and the payment made in that month), a transaction as to which the bill is, I believe, wholly silent, but which shews that persons who are truly and substantially plaintiffs, that those who are truly and substantially the only plaintiffs in this singularly circumstanced cause, are not parties to it, I do not think that I can with propriety take any other course than to dismiss the bill, without prejudice to another suit. The dismissal to be, as against the defendant Edgar, with costs not exceeding 5*l.*, which I give, because of the difference between the bill originally and the bill in its present state; and to be, as against the other defendant, with costs generally, because of there being, as I understand, no replication to his answer, and because of the abandonment of the case against him at the bar (a).

(a) The following are the extracts from the Registrar's Book of the case of *Newman v. Kent*:—

" At the Rolls. }
Master of the Rolls. }

" Friday, the 1st December, 1815.

" Between WILLIAM NEWMAN, &c. . . Plaintiffs.
THOMAS KENT, &c. . . Defendants.

" HIS HONOR doth Order and Decree, that it be referred to Mr. Je-
kyll, one of the Masters of this Court, to compute interest on the

legacy of 150*l.*, at the rate of 4*l.* per cent. per annum, from the end of six months after the death of Richard Kent, and to tax the plaintiffs' costs of this suit: And the defendants, Benjamin Tilstone, John Field, James Vallance, Robert Ackerson, the purchasers, and Susannah Wood, the mortgagee, by their counsel undertaking to pay to the plaintiff such legacy, interest, and cash, It is ordered, that they do pay the same accordingly: And it is ordered, that the said Master do inquire whether the prices fixed on the sale of the estate of the defendant Thomas Kent, were paid on the principle that the estate was subject to the mortgage of 150*l.* in favour of the plaintiff Elizabeth, to be paid by the purchasers over and above the prices so fixed; And for the better discovery thereof, the parties are to produce before the said Master, upon oath, all books, papers, and writings in their custody or power relating thereto, and are to be examined upon interrogatories, as the said Master shall direct: And his Honor doth reserve the consideration of the costs of the said inquiry, and of all further directions, until after the said Master shall have made his report: And any of the parties are to be at liberty to apply to this Court, as there shall be occasion."—B. 1815, fol. 325.

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v.
EDGAR.

" Lord Chancellor.

" Friday, the 10th July, 1818.

" Between WILLIAM NEWMAN, &c. . . Plaintiffs.
THOMAS KENT, &c. . . Defendants.

" HIS LORDSHIP doth Order, that the decree made on the hearing of this cause, on the 1st day of December, 1815, be varied; And it is ordered, that the plaintiffs' bill do stand dismissed out of this Court against the defendant Thomas Kent, with costs, to be taxed by Mr. Jekyll, one of the Masters of this Court: And it is ordered, that such costs, up to the hearing, be paid by the plaintiffs; but this is to be without prejudice to any suit the other defendants, Benjamin Tilston, John Field, James Vallance, Robert Acherson, and Susannah Wood, may think fit to institute against the said defendant Thomas Kent: And it is ordered, that the defendants Benjamin Tilston, John Field, James Vallance, Robert Acherson, and Susannah Wood, the purchasers, do pay unto the defendant Thomas Kent his costs of this suit subsequent to the said decree: And it is ordered, that the sum of 10*l.*, deposited with the Registrar on setting down this cause to be heard on the said petition of appeal, be paid to the defendant Thomas Kent."—B. 1817, fol. 858.

1849.

July 21st &
23rd.

Where a suit was instituted for the delivery up of a cheque given as part of the consideration for a purchase, which was alleged to have been rescinded, and it appeared that the cheque was post-dated and not stamped, the Court, on that ground, refused to interfere.

Under the law of evidence before 14 & 15 Vict. c. 99, a defendant could not have been examined as a witness for a codefendant in precisely the same interest.

CARRINGTON v. PELL.

THIS was a suit for the delivery up of a cheque for 70*l.*, under the following circumstances, as alleged by the bill.

In 1846, Mr. Pell, one of the defendants, an attorney at Welford, in Northamptonshire, had a black horse, which he agreed to exchange with the plaintiff, a London horse dealer, for a chestnut horse and 70*l.* At the time of the bargain, the plaintiff had not sufficient funds at his bankers to meet the payment, but expected, as he alleged, to have sufficient in a few days. He, however, delivered the chestnut horse to Mr. Pell, together with a cheque for the 70*l.*, dated some days subsequently. The cheque on being presented was dishonoured. The defendant Pell retained his black horse, and in effect, as was alleged by the bill, rescinded the contract, using the black horse for hunting and otherwise in all respects as his own, but kept nevertheless the cheque and the chestnut horse. More than two years afterwards, Mr. Pell sold the black horse. He also sold the chestnut horse for 40*l.*, and parted with the cheque to a Mr. Jackson, the other defendant.

In February, 1848, Mr. Jackson brought an action upon the cheque against the plaintiff in equity, the defendant Pell acting as the attorney for Jackson in the action.

The present suit was then instituted to have the cheque delivered up.

Mr. Wigram and Mr. Bagshawe were for the plaintiff.

The VICE-CHANCELLOR asked if it appeared upon the pleadings that the cheque was post dated.

Mr. Wigram and Mr. Bagshawe.—It appears on the pleadings; but no defence is made on the ground of there

Tristram v. Hardley 14 Beav. 21.

Evans v. Coventry 2 J. M. & G. 842.

having been any fraud on the revenue laws. The only issue raised upon the pleadings is, whether the contract was rescinded or not. The defence is, that it was not; and that the defendant Pell had a lien upon the black horse for the purchase money, which was agreed to be paid in addition to the chestnut horse, and had a right to avail himself also of the cheque, so far as it would extend. It is nowhere alleged, that the cheque was not stamped. Where a document is valid upon the face of it, the Court may order it to be delivered up, although it may be legally invalid. It does not even now appear, that the cheque is not properly stamped. And the question of its being stamped or not, is immaterial upon the present issue. An omission to comply with the stamp laws is not *malum in se*. It prevents a document from being put in evidence, and, in some instances, subjects the person omitting to stamp a particular instrument to a pecuniary penalty. But that it is not considered an offence, is clear from the practice of allowing documents to be stamped and the penalty paid.—They cited *Brown v. Duncan* (a).

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CARRINGTON
v.
PELL.

Mr. *Malins* and Mr. *Roxburgh*, for the defendant Jackson, tendered in evidence the deposition of the defendant Pell.

Mr. *Wigram* and Mr. *Bagshawe* objected, on the ground of interest, and cited *Monday v. Guyer* (b).

Mr. *Malins* contended, that nothing had been decided in *Monday v. Guyer*, except that the Vice-Chancellor would not be the first to admit the evidence of a defendant in favour of a codefendant having exactly the same interest. *Wood v. Rowcliffe* (c), was a decision in favour of the admissibility of the evidence in the present case.

(a) 10 B. & C. 93.

(b) 1 De G. & S. 182.

(c) 6 Hare, 183; see ante, p. 340.

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CARRINGTON
v.
PELL.

The VICE-CHANCELLOR said, that the defendant Jackson could only be considered as the agent of the defendant Pell, and could not use the defendant Pell's evidence. His Honor did not think *Wood v. Rowcliffe* at variance with *Monday v. Guyer*, and saw no reason for departing from the latter decision.

Mr. *Malins* and Mr. *Roxburgh* contended, that as the plaintiffs have not attempted to put the cheque in evidence, their case was unsupported. The defendant Jackson was ready to produce the cheque, and now offered to do so.

Mr. *Wigram* objected to its being put in evidence, for the purpose of shewing that it was unstamped; he contended that it either must be rejected, or, if admitted, must be considered as properly stamped.

The VICE-CHANCELLOR said, that as it was tendered in evidence, and objected to, the Court must look at it; and after some discussion it was handed up to his Honor, who said, that he could take notice of the examiner's signature, and of the fact of its having been tendered in evidence, and that it was unstamped.

Mr. *Russell* and Mr. *T. H. Terrell*, for the defendant Pell, contended, that there was no equity in the case made by the bill. All that was thereby alleged would afford a legal defence to an action. They cited *Pearce v. Gray* (a).

Mr. *Wigram*, in reply.—With regard to the question respecting the stamp, if the cheque is to be considered as being put in evidence by the defendant, and not objected to by the plaintiff, it is not the practice of the Court of itself to raise any objection from the want of a stamp. If,

on the other hand, the cheque is rejected, then there is no evidence of the want of a stamp. With regard to there being a defence at law, it is the constant course of the Court to order usurious securities to be delivered up, although usury would be a good defence at law.

1849.
CARRINGTON
v.
PELL.

The VICE-CHANCELLOR:—

In this case, before deciding on the admissibility of Mr. Pell's evidence, I thought it right to hear the evidence read provisionally.

I afterwards held, that it ought to be rejected; and it may not be useless to the parties for me to say, that my conclusion would have been the same upon all points if I had received the evidence of Mr. Pell.

What I might have thought it right to do, if the cheque in question had been stamped, it is not necessary for me to say, for it is not stamped. In point of law it required a stamp to render it valid; and I consider it to be an instrument of such a description that it cannot now be stamped.

On this ground, and without entering into the questions of fact in dispute between the parties, I dismiss the bill, without prejudice to an action being brought, and without costs of any kind on either side.

1849.

July 5th &
18th.

A plaintiff resident abroad, filing a bill to restrain an action brought against him by the defendant in equity, will not be ordered to give security for costs.

A defendant's right to call for security for costs, where the plaintiff is out of the jurisdiction, is not waived or lost by his demurring to the bill before moving.

WATTEU v. BILLAM.

THIS was a motion that the plaintiff might be ordered to give security for costs.

In the bill, the plaintiff was described as "of Brussels, in Belgium, but now sojourning at No. 18, Salisbury-square, Fleet-street, London, contractor for public works."

The bill alleged, that the plaintiff had accepted three bills of exchange for the defendant's accommodation; and that, on the 14th of February, 1849, the defendant caused the plaintiff to be arrested in respect of these bills of exchange. That the plaintiff continued in Whitecross-street Prison until the 27th of February, 1849; that, under duress, he gave eleven bills of exchange for sums of money amounting together to 187*l.* 16*s.* 10*d.*; and that he also executed on that day an agreement, which was set out in the bill; and that he paid on the same day to the defendant two sums of 30*l.* and 10*l.* The bill alleged that the plaintiff was not, either on the 27th of February or then, indebted to the defendant. The bill prayed an account of the transactions, and the payment of the balance; that the three bills of exchange might be cancelled, that the agreement might be declared void, and that the defendant might be restrained from negotiating the eleven bills of exchange, and from commencing any action at law in respect of these bills, and from availing himself of a Judge's order mentioned in the bill.

An injunction had been obtained by the plaintiff, restraining the negotiation of the eleven bills. The defendant then demurred, and the plaintiff amended. The defendant again demurred, and the demurrer was overruled, and six weeks given to answer.

The present motion was supported by affidavits, from which it appeared, that the plaintiff had left England on the 10th of March, to return to Brussels, his then place

Sydney v. Hodge 2 S. & H. 645.

Moscow & Co. v. Dubouche & Co 7 (L. 22)

of residence; but, that he had subsequently removed to Paris, where he was residing with his family; and that the above facts were not known to the defendant until the 29th of June.

1849.
 WATTEU
 v.
 BILLAM.

Mr. *Saunders* moved that the plaintiff in equity might be ordered to give security for costs.

Mr. *Schomberg*, for the plaintiff in equity, submitted, that the defendant had waived all right to security for costs, by the proceedings taken in the cause. He also contended, that the suit ought to be treated as a cross suit, in the nature of a defence to the action brought against the plaintiff by the defendant.

The following cases were cited: *Sloggett v. Viant* (a), *Vincent v. Hunter* (b), and *Desprez v. Mitchell* (c).

The VICE-CHANCELLOR thought that there had been no waiver of the right to require security for costs; but directed inquiry to be made by the Registrar as to the practice in cases where a defendant at law files a bill in equity to restrain an action.

It appeared that the officers of the Court differed on the point: one of the Registrars and Mr. *Berrey* being of opinion, that, in this case, the defendant was not entitled to security for costs; but that all the other Registrars were of a different opinion.

July 18th.

The VICE-CHANCELLOR said, he had had the advantage of obtaining the opinions of the Master of the Rolls and of Sir *James Wigram* on the question, and they took the same view as the Registrar with whom Mr. *Berrey* concurred; and that, his own view being the same, the motion must be refused, but without costs.

(a) 13 Sim. 187.
 VOL. III.

(b) 5 Hare, 320.
 M M

(c) 5 Madd. 87.
 D. G. S.

1849.

July 25th &
30th.

A bill seeking an injunction to stay proceedings at law, was duly answered, without any injunction having been obtained on the original bill; it was then amended, and defendant was served with subpoena to appear and answer on the day following the day on which the eight days from the service of the subpoena expired; the plaintiff obtained, as of course, the common injunction for want of appearance, without affidavit of the truth of the amendments, on the allegation that the defendant, being served with subpoena to appear and answer the plaintiff's bill, had not appeared thereto, although his time for so doing had expired. The writ of injunction was sealed on the same day. On the morning of the same day the defendant entered his appearance, but did not serve notice thereof on the plaintiff's solicitor. On a motion by the plaintiff to extend the injunction to stay trial, and on a cross motion by the defendant to dissolve it:—*Held*, that the injunction had priority over the appearance, and that the injunction so obtained as of course for want of answer to the amended bill was regular, and the common injunction to stay trial was extended.

EYTON v. MOSTYN.

MR. TERRELL, for the plaintiff, moved that the common injunction, which had been obtained for want of an answer to an amended bill, to restrain the defendant from proceeding at law against the plaintiff, might be extended to stay trial.

Mr. Wright, for the defendant, objected, that the common injunction had been irregularly obtained, and opposed the motion. He also supported a cross motion on behalf of the defendant, that the common injunction obtained by the plaintiff might be dissolved with costs for irregularity.

After some question between the counsel as to which motion should be heard first, the Court determined that both motions should be discussed at once as a motion and cross motion.

At the conclusion of the argument on the two motions, it was arranged that a statement of the facts should be settled by counsel, for the opinion of the Registrars and Clerks of Records and Writs.

On the plaintiff consenting that the order extending the common injunction should be discharged, in the event of the order for the common injunction being discharged hereafter by the Court—

The VICE-CHANCELLOR ordered that the common injunction should be extended to stay trial.

The following statement of the facts, agreed on by the

Tulveta v Vincent 14 Beav. 4.

plaintiff and the defendant with reference to the orders and case relied on by counsel in the argument, was then submitted for the opinion of the Registrars and Clerks of Records and Writs.

1849.
 EYTON
 v.
 MOSTYN.

In this cause the plaintiff filed his bill, praying for an injunction for stay of the defendant's proceedings at law.

The defendant appeared and filed an answer, and further answer, without being in default.

Plaintiff then amended his bill, and served subpœna for defendant to appear and answer the amended bill.

On the 20th day of July, being the day following the expiration of the eight days from service of the subpœna, plaintiff obtained, as of course, the common injunction for want of appearance, without any affidavit of the truth of the amendments, on the allegation "that the defendant, being served with subpœna to appear and to answer the plaintiff's bill, hath not appeared thereto, although his time for so doing is expired."

On the morning of the same day the defendant entered his appearance, but did not serve notice thereof on plaintiff's solicitor.

The injunction was sealed on the same day.

The question of the regularity of the injunction comes before the Court on a motion by plaintiff to extend it to stay trial, and a cross motion by defendant to dissolve the injunction for irregularity, with costs.

His Honor the Vice-Chancellor *Knight Bruce* requests the Registrars and Clerks of Records and Writs, to certify to him their opinion on the following points:—

First. Whether, the injunction having been obtained and the defendant's appearance entered on the same morning, the injunction or the appearance have priority?

Secondly. If the injunction have priority, whether the plaintiff, having amended after answer, be entitled to an injunction as of course on default of appearance to the

1849.
 EYTON
 v.
 MORTYN.

amended bill, without affidavit of the truth of the amendments, either under the General Orders, or under the old practice as it existed prior to the 3rd Order of the 9th of May, 1839?

The Orders cited as applicable were—the 3rd Order, 9th of May, 1839; the 36th Article, 16th Order, May, 1845; the 59th of the same Orders; the 3rd Article, 16th of the same Orders.

The cases cited were *James v. Downes* (a) and the cases therein cited, *Vipan v. Mortlock* (b), *Statham v. Hughes* (c), *Brooks v. Purton* (d).

On this statement nine Registrars returned the following certificate:—

“ We the undersigned Registrars of the Court of Chancery beg respectfully to give the following answer to your Honor on the points submitted for our consideration.

“ First. On the first point we are clearly of opinion that the injunction takes priority of the appearance. In order to prevent the plaintiff from obtaining an injunction, the defendant was bound to appear within eight days from the service of the subpoena; and not having appeared until the ninth day, after he was in default, his appearance does not invalidate the plaintiff's order for the injunction obtained the same morning. It is stated also, that notice of the appearance has never been served on the plaintiff's solicitor. By the 23rd Order of the 26th of October, 1842, this should have been done on the same day.

“ Secondly. On the second point, we have had some difficulty in coming to a conclusion, not having been able to find any decided authority to meet the circumstances where the defendant is in default for not appearing to a bill for an injunction, which has been amended after answer; we can, therefore, only state our own view of the

(a) 18 Ves. 522.

(b) 2 Mer. 476.

(c) 2 S. & S. 382.

(d) Cr. & Ph. 233.

construction of the General Orders; and, upon the whole, we are of opinion that the injunction should be maintained. The expression "a bill," in the 3rd Article of the 16th Order, and the 59th Order of the 8th of May, 1845, may be properly applicable to an amended bill as well as any other; and the words at the conclusion of the 3rd Article of the 16th Order of the 8th of May, 1845, "if no injunction has been previously obtained," would seem to refer particularly to the case of a bill amended after answer. If so, they are conclusive upon the point.

"With regard to the practice prior to the 3rd Order of the 9th of May, 1839, in the case of *Nelthorpe v. Law* (a), before Lord *Erskine*, it seems to have been considered that, if the injunction had not been obtained when the answer came in, and the plaintiff afterwards amended, an injunction obtained as of course on default of answer to the amended bill, and without affidavit verifying the amendments, was regular.

"In *Bliss v. Boscawen* (b), Lord *Eldon* appears to have acquiesced in this view of the practice, though with some reluctance. Lord *Erskine's* decision is, however, said by Mr. Eden in his work on Injunctions (p. 129), to be contrary to reason and at variance with the practice; and he expresses an opinion that the Court would probably, should the case ever be reconsidered, require an affidavit.

"In the subsequent case of *Statham v. Hughes* (c), verified by the entries in the Reg. Lib. B. 1824, fo. 795 and 1880, the Vice-Chancellor Sir *J. Leach*, after consideration and inquiry into the practice, held, that under nearly similar circumstances with *Nelthorpe v. Law* the injunction was regular.

"There is no reason to suppose that the practice would have been different where the defendant was in default in an attachment for want of appearance.

"If, however, the injunction on the original bill had been

1849.
 EVTON
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(a) 13 Ves. 323. (b) 2 Ves. & B. 101. (c) 2 S. & S. 382.

CASES IN CHANCERY.

... obtained, or had been dissolved or refused upon
... of the answer, the injunction on the amended
... and not be granted but upon default, affidavit, and
... application: *James v. Downes* (a), *Vipan v. Mort-*
... *Bliss v. Boscawen* (c), and *Home v. Watson* (d), Reg.
... 1827, fo. 318.

C. D. COLVILLE, F. H. DAVIS, H. WOOD,
J. COLLIS, HENRY E. BICKNELL, CECIL MUNRO,
O. WALKER, H. HUSSEY, C. D. COLVILLE, junr."

(a) 18 Ves. 522. (b) 2 Mer. 476. (c) 2 Ves. & B. 101.

(d) The following is an extract of the case above referred to from the Registrar's Book:—

"Vice-Chancellor. "Wednesday, the 5th day of December, 1827.

"*HOME v. WATSON.*

"UPON opening of the matter this present day unto this Court by Mr. *Horne* and Mr. *Wakefield* of counsel for the defendant, it was alleged, that, by an order, dated the 5th of February, 1827, suggesting that the defendant, being served with process to appear to and answer the plaintiff's amended bill, appeared accordingly; and in regard the defendant Horace Watson had obtained an order for time to answer, and yet in the meantime prosecute the plaintiff at law for the matters in the plaintiff's bill complained of: It was thereupon ordered, that an injunction should be awarded for stay of the said defendant Horace Watson's proceedings at law for and touching any matters here in question, until the said defendant should fully answer the plaintiff's bill, and this Court make other order to the contrary; but the said defendant was, in the meantime, at liberty to call for a plea and proceed to trial thereon, and for want of a plea to enter up judgment, but execution was thereby stayed. That it appears by the affidavit of the defendant Horace Watson, that, on or about the 3rd of June, 1826, he was served with a paper writing, purporting to be a copy of a writ of injunction, issuing out of this Court upon the bill of the said plaintiff in this cause, and wherein the said William Home was plaintiff, and the said deponent, defendant; and which paper writing was marked A., and exhibited to the said deponent at the time of making that his affidavit; and that, on the 5th day of November instant, he was served with another paper writing, purporting to be a copy of an injunction issuing out of this Court upon the amended bill of the said plaintiff in the said cause, and which last-mentioned paper writing was marked B., and exhibited to the said deponent at the time of making that his affidavit; and that the original bill in this cause was filed on or about the 20th of June, 1825, was amended pur-

The certificate of Mr. Berrey, addressed to the Vice-Chancellor on the above statement, on behalf of the Clerks of Records and Writs, was as follows:—

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“Records and Writs Clerks’ Office, 30th July, 1849.

“Sir,—In answer to the questions sent here by your Honor (through Mr. Leach) respecting the injunction in this cause, I beg leave to say,

“First.—I am of opinion that, under the circumstances stated, the injunction had priority, the plaintiff being entitled to move for it at the sitting of the Court on the defendant’s default, and no notice of any appearance having been given as required by the 23rd Order of the 26th of October, 1842.

“Secondly.—I am of opinion that the plaintiff, not having obtained an injunction on the original bill (a), and having amended after answer, and served a subpoena to appear to and answer the amended bill, was entitled, on default of appearance thereto, as of course, and without an affidavit of the truth of the amendments, to an injunction, under the 3rd and 11th Articles of the 16th Order of the 8th of May, 1845, and the 59th of the same Orders: all of which apply generally to ‘a bill praying an injunction to stay proceedings at law;’ a description which, according to the

suant to an order dated on or about the 31st day of May, 1826, and was a second time amended pursuant to an order dated on or about the 25th of November, 1826. That the defendant is advised, that the said order of the 5th of February last, and the injunction issued thereon, is consequently irregular. It was therefore prayed, that the said order, bearing date the 5th of February, may be discharged, and the writ of injunction issued thereon may be dissolved for irregularity, with costs, to be taxed by one of the Masters of this Court. Whereupon, and upon hearing Mr. *Pepys* and Mr. *Garrett* of counsel for the plaintiff, the said order and the said affidavit read, This Court doth Order that the said order, dated the 5th of February, 1827, be discharged.”—A. 1827, fol. 318.

(a) Vide the seven concluding words of 16th Order of May, 1845, Article 3.

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Lord Chancellor's (Lord *Cottenham's*) definition in *Brooks v. Purton* (a), 'includes equally original, amended, and supplemental bills.'

The 3rd and 11th Articles of the 16th Order and the 59th Order of May, 1845, above referred to, appear to apply to a default in appearing to any bill praying a common injunction, and impose no condition on the plaintiff; and the 3rd Order of the 9th of May, 1839, and 36th Article of the 16th Order of the 8th of May, 1845, by which two alone the affidavit of the truth of the amendments is required, refer only to a default in answering an amended bill after such appearance (from the date of which the eight days are to be reckoned); and the words 'after appearance,' in each of those last-mentioned Orders, I submit, clearly shew they were so intended.

"In the opinions here given, the other Clerks of Records and Writs concur with me.

"I have the honour to be,

"Your Honor's obedient humble servant,

"J. A. BERREY."

July 30th.

The VICE-CHANCELLOR said, he had been informed that the Master of the Rolls agreed in the opinion expressed by Mr. Berrey; and that it was also his own opinion. As, however, the point appeared to have been a doubtful one, in refusing the motion of the defendant, he should refuse it without costs.

(a) 1 Cr. & Ph. 239.

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BRIGGS v. PENNY.

THIS was a suit instituted by the executors of the will of the fifth Earl of Oxford, for the administration of the estate of the Hon. Frances Harley, of whom the Earl was the brother, and, at her death, the sole next of kin.

Frances Harley, by her will, dated the 11th of May, 1835, bequeathed as follows:—

“To Sarah Penny, of Great James-street, Bedford-row, 3000*l.*; and a like sum of 3000*l.* in addition, for the trouble she will have in acting as my executrix.”

And, at the end of the will, as follows:—

“And lastly, as to all the rest, residue, and remainder of my personal estate and effects, subject to and chargeable with the aforesaid several legacies and annuities, save and except such of them as are of a charitable nature, which I exclusively charge upon such part of the said personal estate as by law I am empowered to charge therewith, and not out of any part of my lands, tenements, or hereditaments: I give and bequeath the same unto the said Sarah Penny, of Great James-street, Bedford-row, her executors, administrators, and assigns, well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes; and I hereby appoint the said Sarah Penny sole executrix of this my last will and testament, revoking all former and other wills by me at any time heretofore made, and declaring this alone to form my last will and testament.”

The will and two codicils, one dated March 19th, 1836, and the other without date, and unattested, were, at the death of Miss Harley, found in a box which she was in the

Held, that there was no sufficient expression of intention that the executrix should take the residue beneficially, and that she therefore held it in trust for the next of kin.

Held, also, that the unattested papers could not be looked at for the purpose of ascertaining what the testatrix's intentions were.

July 25th *de*
28th.

Aug. 6th.

A testatrix bequeathed 3000*l.* to a legatee, whom she appointed her sole executrix; and 3000*l.* in addition for the care and trouble she would have in acting as executrix. And the testatrix bequeathed all the rest, residue, and remainder of her personal estate to the same legatee, her executors, administrators, and assigns, “well-knowing” that she would make a good use and dispose of it in a manner in accordance with the testatrix's views and wishes. Among the testatrix's papers some writings were found, made after the passing of the Wills Act, but not attested as required by that statute, denoting several charitable as well as other gifts, which the testatrix desired should be made. One of these was headed “my wishes.”

Johnson v Ball 5 Def. Ct. 91. *Reynolds v Horknight* 18 Decc. 142.
Shepherd v Nottidge 2 S. & W. 769. *Swinn v Sullivan* 8 29 [67]

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habit of taking with her from place to place, and in which she kept her papers of moment and concern, inclosed in an outer cover or wrapper, made of an old newspaper, closely sealed up with the deceased's own seal.

The testatrix died on the 25th of November, 1848.

There were also found, at the testatrix's death, in her writing-desk, without any envelopes, the draft of the will and four other papers, which were in the pleadings distinguished by the letters B., C., D., and E. respectively, and all of which were in the testatrix's handwriting, and without date.

The paper B. was written in ink, and the papers C., D., and E. in pencil.

The paper B. was as follows:—"It is my desire that Mary Lyford and Thomas Wheatley, if living with me at my death, shall have an annuity of 30*l.* a year during the term of their natural life, free of legacy duties. I give to St. George's Hospital, the Middlesex Hospital, and the St. Mary-le-bone Hospital, the sum of 1000*l.* each; to the Charing Cross, the London, the Fever, the Ophthalmic, and Consumptive Hospitals, 500*l.* each; to St. Ann's School, the London Orphan, and the Infant Orphan Asylums, 1000*l.* each; to the National Benevolent, 1000*l.*; to the Propagation of the Gospel and the Society for Promoting Christian Knowledge, 1000*l.* each; to my god-daughter Mary Prior, 1000*l.*; to my god-daughter Frances Darby, 1000*l.*; to my god-daughter Maria Frances Owen, 1000*l.*; to the Church Building Fund, 5000*l.*"

Paper C. was as follows:—"My dear friend, you will see, by my will, that I have appointed you my sole executrix and residuary legatee, being well aware of your peculiar integrity in fulfilling my wishes. In law I cannot leave much of my property in charities; I therefore request that you will consult Mr. Harrison in what manner you can carry my wishes into effect. This paper must not appear. I wish some land to be purchased, and six

almshouses erected and endowed in the same manner as those at the Hay. A marble tablet to be put up in Brompton church, to the memory of my dear father, mother, brother, sister, and self; 1000*l.* to be given to the Propagation of the Gospel; Miss Margaret Hewell, daughter of the late Benjamin Hewell, 20*l.* per annum, during the term of her natural life. To Brecon Infirmary, 1000*l.*; to give at the rate of 500*l.* towards building churches where there are to be sittings for the poor; to build and endow schools for girls, to be taught reading, writing, plain work, and perform truly their duty to their God; 20*l.* per annum to each of six clergymen's daughters that are old and infirm; to Mr. Harrison, 10,000*l.* for his faithful services."

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Paper D. was as follows:—"My wishes.—F. Harley. The school I built at Cowley I wish to be endowed with a salary to the schoolmistress of 30*l.* per annum, the sole control of which to be vested in the rector of Cowley; I likewise wish to leave 500*l.* to the poor of Cowley, the interest to be laid out in any way the rector thinks best, at Christmas; I leave 100*l.* to my god-daughter Frances Darby; to my god-daughter Mary Prior, 1000*l.*; to Caroline Watchurst, 1000*l.*; to Augustus Maryon, 500*l.*; to Sophia Kennedy, 500*l.*; to Miss White, 100*l.*; to Mrs. Evans, 500*l.*; to E. Dalton, Esq., 200*l.*; to Mr. Harrison, 1000*l.*; to Wheatley and Lyford, 30*l.* per annum during their lives; my law book to William Hilliard, and 100*l.*; my book on Divinity to Joseph Hilliard, and 100*l.*; to the Society for Bettering the Condition of the Poor, 100*l.*"

Paper E. was as follows:—"Directions for Miss Penny: A piece of land to be purchased, in a convenient spot, near a market-town in Brecon or Herefordshire, and (a)

almshouses erected, on the same plan as those at the Hay, with a garden to each, and 20*l.* per annum allowance to each woman; a marble tablet to be put up in Brompton church, to the memory of my dear father, mother, brother,

(a) The blank was in the original.

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sister, and self, plain but handsome; 1000*l.* to the Missionary Society; ditto to the Bible Society; and 5000*l.* to the building of different churches, where the seats will be free for the lower class of people; 500*l.* to the

(a); 300*l.* to the Humane; to retain 300*l.* per annum for yourself, to keep a carriage during your life; at your decease, to be distributed in charities, as you think proper."

The plaintiffs opposed the probate of the will, which was, however, with the two codicils, granted to the defendant Sarah Penny.

The bill charged and submitted, that, by the Act 11 Geo. 4 & 1 Will. 4, c. 40, the defendant, being the executrix, was thereby constituted a trustee of all undisposed-of residue on behalf of the next of kin; and that, by virtue of the same statute, she was precluded, as executrix, from claiming any beneficial interest in any undisposed-of residue, unless it appeared, by the will, that it was the testatrix's intention that she should take beneficially. The bill charged, that no such intention appeared on the will; and that a contrary intention was evinced by the fact that she was a legatee to the amount of 3000*l.*, and that a further sum of 3000*l.* was likewise given to her by the testatrix expressly for her trouble as executrix; and that the papers B., C., D., and E. clearly demonstrated that she was not intended to take a beneficial interest in the residue, except as to the provision made for her in paper E. The bill also charged, that the testatrix reposed the fullest confidence in Miss Penny, and consulted and advised with her in respect of the management of her affairs, and in particular in the administration of her charitable gifts; and that the testatrix, being desirous of giving her property to charitable purposes, and being aware that the same were void and inoperative in law, communicated to Miss Penny her views and wishes in respect to such cha-

(a) The blank was in the document.

ritable disposition of her property; and that it was thereupon arranged and agreed between them that Miss Penny should carry such purposes into effect, and that the testatrix should execute her will so that the same should not therein appear, but that the testatrix should, privately, by some letter or other written papers, declare and explain to Miss Penny her views and wishes; and that Miss Penny undertook and agreed with the testatrix that, to the extent of any charitable gifts or bequests, she would carry into effect the testatrix's wishes and views expressed or thereafter to be expressed and declared in manner aforesaid. And the bill charged, that the testatrix, on the faith of such secret understanding and promises, bequeathed the residue of her personal estate and effects as appeared in the will; and that no valid declaration of her wishes was ever made. And the bill charged an allegation on the part of the defendant, that, by virtue of the papers B, C, D, and E. a valid trust was and is effectually declared by the testatrix of the residue of her personal estate and effects; whereas the plaintiff charged the contrary, and that the trust so attempted to be declared was in contravention of the law, and that the papers were insufficient to create a trust, and left the aforesaid residue undisposed of. The prayer was for the usual accounts, and for the administration of the personal estate, and that the residue of the personal estate might be ascertained, and that it might be declared that the plaintiffs, as the legal personal representatives of the next of kin of the testatrix, were entitled to the residue and clear surplus of the testatrix's leasehold and other personal estate and effects; and that the said Sarah Penny was a trustee thereof on behalf of the plaintiffs.

The defendant, by her answer, said she was advised, and insisted, that it appeared by the will and codicil, and memoranda, that the testatrix intended her, as residuary legatee, to take the residue beneficially; that she claimed as residuary legatee and not as executrix; and she sub-

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mitted and insisted that she was not constituted a trustee by the operation of the Wills Act; she submitted that, if the Court should be of opinion that the papers B., C., D., and E. manifested the intention that she should not take the residue beneficially, the residue was only subject to the trusts declared by them; and that after satisfaction thereof, so far as such trusts (if any) might be valid, the residue belonged to her beneficially; she denied that the testatrix made such communications respecting her wishes to dispose of her property as were alleged by the bill; and said, that the testatrix never in fact made any communication to her of her will, codicil, or memoranda, or any or either of them, or with respect to the dispositions thereby made, or with respect to any testamentary dispositions made by her, or with respect to any dispositions of her property, to take effect after her death; and that, in fact, the defendant did not, until the testatrix's death, and the perusal of the said will, codicil, and memoranda, know of the dispositions made thereby, or by any or either of them; she also denied that there was any understanding between her and the testatrix, that, to the extent of any charitable gifts or bequests, the defendant should carry into effect the testatrix's wishes or views expressed, or thereafter to be expressed or declared, or any understanding or promise to the like effect, or any other effect. That although the papers B., C., D., and E. were without date, yet it appeared that some of those papers were written since the Wills Act came into operation, as they gave benefits to persons not born until after 1838. She submitted that the four papers could not be regarded for the purposes of the suit, and that the plaintiffs were not entitled to make any use of them; and she claimed to be entitled to the clear residue beneficially, freed from any trust.

On the counsel for the plaintiffs tendering in evidence the four papers above mentioned, the counsel for the defendant objected to their admission. But it was arranged

that the question of their admissibility in evidence should be discussed as part of the general argument.

Mr. *Turner*, Mr. *Malins*, and Mr. *Walford* for the plaintiffs.—By the Act 11 Geo. 4 & 1 Will. 4, c. 40, an executor is to be deemed by Courts of equity to be a trustee for the persons who would be entitled under the statute of distributions, unless it appears by the will or any codicil thereto that the person appointed executor was intended to take such residue beneficially. The operation of the Act is not confined to wills containing no disposition of the residue, but extends to all cases in which the will does not shew that the executor is intended to take the residue for his own benefit: *Love v. Gaze* (a), *Andrew v. Andrew* (b). *Wood v. Cox* (c) may be cited on behalf of the defendant, but is altogether different from the present case. The will there bequeaths the residue to the executor “for his own use and benefit.”

Independently of the statute, the bequest of 3000*l.* to Miss Penny would be sufficient to shew that she was not to take the residue beneficially: *Rachfield v. Careless* (d), *May v. Lewin* (e), *Duchess of Rutland v. Duke of Rutland* (f), *Dawson v. Clarke* (g), *Whitaker v. Tatham* (h), *Mapp v. Elcock* (i).

Another view of the case is, that the words “well-knowing that she will make a good use and dispose of it in accordance with my wishes,” create a precatory trust; and, as the objects of it are undefined, the trust results for the benefit of the next of kin: *Stubbs v. Sargon* (k), *Hudson v. Bryant* (l), and *Corporation of Gloucester v. Wood* (m).

(a) 8 Beav. 472.

(b) 1 Coll. 686.

(c) 2 My. & Cr. 684.

(d) 2 P. Wms. 158.

(e) 2 P. Wms. 159, n. 2.

(f) 2 P. Wms. 210.

(g) 15 Ves. 409; 18 Ves. 247.

(h) 7 Bing. 628.

(i) 2 Ph. 793,

(k) 2 Keen. 255; S. C., 3 My. & Cr. 507.

(l) 1 Coll. 681.

(m) 3 Hare, 131.

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So the case stands, independently of the four documents which have not been proved in the Ecclesiastical Court. With regard to the admissibility of these papers in evidence, they are admissible as containing declarations of trust: *Smith v. Attersoll* (a), *Earl of Inchiquin v. French* (b), *Metham v. Duke of Devon* (c), and *Taylor v. George* (d). They are also admissible to shew that the intention was to infringe the provisions of the Mortmain Act. Even parol evidence is receivable: *Muckleston v. Brown* (e), *Bayne v. Trimmer* (f), *Stickland v. Aldridge* (g), and *Bosson v. Statham* (h). They also referred to *Podmore v. Gunning* (i). [The Vice-Chancellor referred to *Habergham v. Vincent* (k), and *Chamberlain v. Agar* (l).]

Mr. Bethell, Mr. Russell, and Mr. Hislop Clarke, for the defendant.—The way in which the bill puts the case as to the paper writings is, by charging that they were communicated to the executrix, and thus imposed a trust upon her, according to *Stickland v. Aldridge* (g). That charge, however, is pointedly denied by the answer, and there is no attempt to establish it. This being so, a legatee has a right to say, “my title under the will cannot be affected by anything but a testamentary instrument of the same character.” But the papers are now relied upon, first, as intended declarations of trust; secondly, as shewing an illegal intention. Now, there never has been a case where unproved documents have been regarded, unless they have been, by their contents or their local situation, connected with or annexed to the testamentary instrument. For instance, in the case referred to of *Smith v. Attersoll* (a), the paper writing was signed by the devisees, and some lines had been

(a) 1 Russ. 266.

(b) 1 Cox, 1.

(c) 1 P. Wms. 529.

(d) 2 V. & B. 378.

(e) 6 Ves. 68; and see *Burney v. Macdonald*, 15 Sim. 13.

(f) 7 Ves. 517.

(g) 9 Ves. 516.

(h) 1 Eden, 508.

(i) 7 Sim. 644.

(k) 2 Ves. jun. 204.

(l) 2 V. & B. 259.

added by the testator, and it referred to the will. At all events, the case is no authority with respect to an uncommunicated paper. *Taylor v. George* (a) is also quite distinguishable from the present case. There was in that case a devise of real estate, which the Court therefore might look at without regard to probate; and it is not clear from the report that the codicil there had not been proved. If a paper is communicated to a legatee, it is admitted in evidence, not as the paper of the testator, but as that of the legatee, and as containing an agreement entered into by him. In *Lord Inchiquin v. French* (b), the paper was of the same date, and the point was not much discussed. As to illegal intention, all the paper could by possibility shew would be, that, after making a valid will, the testatrix must have had an illegal intention, which she never expressed in a way which the Court can regard. In *Boson v. Statham* (c), the devisee had admitted the existence of a secret trust, which is here positively denied. In *Adlington v. Cann* (d), the instruments were rejected as being made after the will.

With regard to the Act 11 Geo. 4 & 1 Will. 4, c. 40, its operation is confined to cases in which there is no express gift of the residue. This is clear from the preamble, "whereas testators by their wills frequently appoint executors without making any express disposition of the residue of their personal estate." Nor was anything contrary to this view of the Act decided by *Love v. Gaze* (e) or *Andrew v. Andrew* (f). In the former case, the judgment proceeds upon the circumstance of there being no mention of the word "residue;" and all that it decides is, that a general gift with certain purposes declared is not an "express" disposition of a residue, so as to prevent the application

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(a) 2 V. & B. 378.

(b) 1 Cox, 1.

(c) 1 Eden, 508.

(d) 3 Atk. 141.

(e) 8 Beav. 472.

(f) 1 Coll. 686.

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of the Act. *Andrew v. Andrew* proceeded upon the particular provisions of the will in that case. The intention of the Act was merely to shift the presumption of law from the side of the executor to that of the next of kin. Now Miss Penny does not claim as executrix, but as residuary legatee. Her character of executrix has nothing to do with the case; and the presumption of law is as much in her favour as in the case of any other legatee, unless it can be shewn upon the will that she is a mere trustee.

With respect to the words relied upon as creating a trust, the law stands thus:—If I give property to a person calling him a trustee, or express an intention to declare a trust, and no trust is declared, the character of legatee still remains, but the law creates in him a resulting trust. But this rule has been confined to cases where there is an express mention of trust, or an express statement that the legatee is a trustee; and it is settled, that mere precatory words, insufficient to create a complete trust, are not sufficient to render a devisee or legatee a trustee. [The *Vice-Chancellor* referred to *Morice v. Bishop of Durham* (a).] The words “upon trust” were used in that case. A precatory trust ineffectually declared will not make the legatee a trustee for the next of kin; although the use of the word “trust” would have that effect, if the trust be not effectually declared. The principle is, that, if the words would not be sufficient to create a precatory trust, they are not sufficient to accomplish the subsidiary object of shewing a trust to be intended: *Gibbs v. Rumsey* (b), *Boughton v. Knight* (c), *Wood v. Cox* (d). There are three classes of cases:—1st. Where a trust is created and its objects not defined: in these cases the next of kin takes. 2ndly. Where no express trust is declared, but words of con-

(a) 9 Ves. 399, and 10 Ves.
535.

(b) 2 V. & B. 294.

(c) 11 C. & F. 513.

(d) 2 M. & Cr. 684.

fidence are used, and objects are denoted incapable of taking: in these cases also the next of kin takes. 3rdly. Where no express trust is declared, but some words of confidence are used, and no objects are denoted: in this last class of cases the legatee takes.

There are, however, in this will no precatory words. The testatrix merely justifies the gift which she had unambiguously made, and explains the reason of it. The case is stronger in favour of the legatee than those in which the Court has held, that the expression of a moral obligation was not to create a legal one.—They also cited and commented upon *Malim v. Keighley* (a), *Boughton v. Knight* (b), *Ommaney v. Butcher* (c), *Wright v. Atkyns* (d), *Williams v. Kershaw* (e), *Benson v. Whittam* (f), *Fowler v. Garlike* (g), *Sale v. Moore* (h), *Vezey v. Jamson* (i), *Ellis v. Selby* (k), *Curtis v. Rippon* (l), *Abraham v. Alman* (m), *Hoy v. Master* (n), *Lechmere v. Lavie* (o), *Meredith v. Heneage* (p), *Bardswell v. Bardswell* (q).

Mr. Turner, in reply.—Even if we failed in shewing a trust upon the construction of the will, still the executrix must shew an intention that she shall take beneficially, before she can defeat the claim of the next of kin: *Love v. Gaze*, *Andrew v. Andrew*. Whatever may be the construction put upon the words “well knowing,” they cannot be taken to shew that the executrix was to take beneficially. It is, therefore, unnecessary to discuss whether

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| (a) 2 Ves. jun. 333. | (A) 1 Sim. 534. |
| (b) 3 Beav. 175; 11 C. & F. 513; and see 1 Sim., N. S., 343; 6 Hare, 413. | (i) 1 S. & S. 69. |
| (c) 5 C. & F. 111. | (k) 7 Sim. 352. |
| (d) T. & R. 260. | (l) 5 Madd. 434. |
| (e) T & R. 156. | (m) 1 Russ. 509. |
| (f) 5 Sim. 22. | (n) 6 Sim. 568. |
| (g) 1 R. & M. 232. | (o) 2 M. & K. 197. |
| | (p) 1 Sim. 542. |
| | (q) 9 Sim. 319. |

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the words "trusting," "confiding," and "knowing," can be substantially distinguished. It has been argued, that there is no case in which the next of kin have taken in such circumstances, where the word "trust" has not been used. But, in anticipation of that argument, I referred to *Stubbs v. Sargon*, where none of the words occurred which are contended to be requisite to create a resulting trust. Suppose the gift in *Ellis v. Selby* had been "I give for the purpose of &c.," can any one doubt that the decision would have been the same, although the word "trust" was not used? The distinction would be an idle one. In *Bardswell v. Bardswell* (a) the words were "well knowing."

Lastly. As to the unproved papers, they are admissible for the purposes for which we rely on them: In the Goods of *Dyer* (b), *Rymes v. Clarkson* (c). These papers are as much connected with the will as the papers were in those cases; and on their authority, and on that of the cases already referred to of *Lord Inchiquin v. French* and *Metham v. Duke of Devon*, we rest the admissibility of the papers in evidence in this suit.

August 6th. The VICE-CHANCELLOR:—

The plaintiffs in this cause sue as the executors of the Earl of Oxford, lately deceased, who for a short time survived his sister Miss Frances Harley, of whom the defendant is the executrix; the object of the bill being to establish the claim of Lord Oxford, as Miss Harley's sole next of kin at her death, which he is admitted on each side to have been, to her residuary personal estate, which however is by her will given in terms to the defendant, who contends that it is so given beneficially, without qualification, or with such qualification only as is effected (if any is effected,) by four papers written by Miss Harley, which are mentioned in the pleadings, and marked respectively B., C., D.,

(a) 9 Sim. 319.

(b) 1 Hagg. 219.

(c) 1 Phillim. 35.

and E., under no one of which, as the defendant contends, Lord Oxford took, or could have claimed, any benefit.

The plaintiffs insist that Miss Harley gave the residue of her personal estate to the defendant, not beneficially, but for certain purposes, either wholly undisclosed and wholly unknown, or apparent only on one or more or all of the four papers just mentioned; and that the purposes, if any, thus apparent being to a considerable extent such as the statute of George 2, called the Mortmain Act, has prohibited from being so effected, must, to that extent at least, be held to have failed for Lord Oxford's benefit; and the plaintiffs lay claim to the whole of the residuary personal estate, or, failing that, to a great portion of it accordingly.

They therefore do not admit that any one of the four papers marked B, C, D, and E is, for any purpose or to any extent, valid, effectual, or to be regarded. And the defendant, on her part, distinctly maintains that, as against her, the four papers are for every purpose void; and that the case ought, as against her, to be treated as if not one of them had ever existed. I may here observe, that, on neither side, has any objection been made on the ground that the four papers are, as I believe them to be, unstamped. Nor has the defendant by her answer, or at the bar, objected that the suit is defective in parties.

Of the four papers, not one has been admitted to probate; and not one can, for any purpose of this cause, be treated or considered as testamentary. If any one of them is valid at all, it can only be deemed valid in some other character than as a testamentary instrument therefore, so far as the present suit is concerned.

Two codicils were admitted to probate with Miss Harley's will. But of these two codicils it has not been contended, and does not seem, that either is material for any present purpose.

The first question is upon the construction of the will,

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and arises as well on the manner in which particular legacies are given to Miss Penny (the defendant), as on the language in which the residue is bequeathed.

Among various legacies to various persons there is this bequest to the defendant: "To Sarah Penny, of Great James-street, Bedford-row, 3000*l*., and a like sum of 3000*l*. in addition, for the trouble she will have in acting as my executrix."

The residue is given thus:—[His Honor read the residuary bequest.]

The will is dated 13th of May, 1835. One of the codicils is dated 19th of March, 1836. The other is neither dated, nor attested, nor signed. The testatrix died in 1848.

Now, though the language of the particular bequest to the defendant is not conclusive as to the construction of the gift of the residue, yet, a person reading the will for the first time, and pausing immediately after that particular bequest, would, of necessity (I think), expect to find in the succeeding part of the instrument, either no express disposition of the residuary personal estate, or a disposition of it otherwise than for the benefit, absolutely and without qualification, of the executrix. The effect of the terms of the particular bequest must, I say, as it appears to me, be so to affect the mind of the reader. Anything much less likely to be said by a testatrix, (particularly one in Miss Harley's circumstances), if she designed the residue for the absolute benefit of her executrix, can hardly, perhaps, be reasonably imagined; especially when it is observed that the particular bequest consists of two legacies, to one of which the declared motive or object appears confined. Under the law as it stood before the statute 1 Will. 4, c. 40, those, or equivalent words, used in a case of two executors having unequal legacies, or of whom one only had a legacy, would have excluded them from all title to the residue beneficially in the character of executors.

On the whole, I cannot agree that, upon a question of the interpretation of the residuary gift in this will, the language of the particular gifts is to be forgotten or disregarded; especially when (to borrow a remark made by Lord Eldon in *Langham v. Sandford* (a),) it is remembered, that every part of the will became at one and the same time the will of the testatrix, namely, by the act of subscription, not one part before another. The will says, together and at the same moment, everything that it does say.

The words "her executors, administrators, and assigns," and the words "make a good use," are probably rather favourable than unfavourable to the defendant's argument, but are also not conclusive. Nor is the remark (if indeed well founded) that the words "in a manner in accordance" are, in point of grammar and syntax, connected as directly and as much with the words "good use," as with the word "dispose." This observation was, I think, suggested by myself; but I am not sure that it is correct, and I attribute no weight to it against the defendant. The words "make a good use," however, cannot be read as if they were disjoined and separated. They are part of the same sentence or paragraph that contains the word "dispose" and the expression "views and wishes," which, forming an important portion of the context, seem to me to affect materially and restrict the phrase "good use."

Then as to the words "well knowing," these cannot be understood literally. The testatrix did not nor could know that which she professes to know. She used this expression in a sense in which it is often used, as indicating belief and confidence with respect to the future. And how do belief and confidence differ from faith and trust? The phrase "well knowing," and the expression of being well assured—that of not doubting—that of desiring—

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(a) 19 Ves. 641.

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that of hope—have in various cases, some if not all of which are, with others relevant to the present dispute, collected by Mr. Lewin in his valuable book, been held sufficient to denote an intention to create a “trust” in the sense in which the Court of Chancery uses that word.

Then, what is the force—what the meaning of the words “my views and wishes,” as used in the will? If the testatrix had made her will and died before the statute 1 Will. 4, c. 40, had not given any legacy to Miss Penny, and had not expressly disposed of the residuary personal estate, but had said in the will, “I have certain views and wishes concerning the residue of my personal property, and in accordance with those views and wishes I know that my executrix will dispose of it:” Would the executrix, in the absence at least of any knowledge by her, and of any evidence of what the testatrix meant by “those views and wishes,” have been a trustee of the residue for the next of kin? An affirmative answer to this question could not probably be given by a person taking the defendant’s view of the construction of the will before the Court; but, (the words “in addition, for the trouble she will have in acting as my executrix” being in my opinion, as I have said, material and weighty in this case,) a negative answer to it would not be necessarily inconsistent with that of the plaintiffa. Whether the statute 1 Will. 4, c. 40, has a bearing upon the present cause may be a disputable point; certainly, however, it cannot affect the cause favourably to the defendant. Part of the argument for her has been tantamount perhaps to a contention that the words “my views and wishes” are to be read as if they were Miss Penny’s “views and wishes.” It was in terms argued, that the language accompanying the residuary gift, was only the statement of a reason for making a bequest to a legatee beneficially; as if the testatrix had merely said, “I give her the residue of my property because I

know how worthy she is of it," or "because, from her past conduct, I know how well and wisely she will employ it;" and it is true that the words may be in a sense said to denote the cause or motive of the gift. But the cause or motive of a gift for what purpose? If not the cause or motive of a gift to the legatee beneficially, the argument fails. The words appear to me, in denoting the cause or motive, to denote also the object and end; that object—that end—not the benefit, or not necessarily the benefit, of the legatee. It was contended also for the defendant, that the expression "views and wishes" ought to be construed as referring to the testatrix's general habits and character, or to the general course, manner, and tenor of her own life. It is however, as it appears to me, more specific and particular in its nature and application: she has used I think the word "views" as meaning design, plan, or intention; or plurally, designs, plans, or intentions; and the word "wishes" (which cannot merely be interpreted to mean "example") must be taken, I conceive, to have a meaning little if at all different from "desire," and to be not less strong certainly in the plaintiffs' favour than the word "views."

"To wish" is explained by Mr. Charles Richardson as meaning "to look after eagerly, desirously; to desire." Dr. Johnson gives to the substantive three interpretations, which are, "longing desire," "thing desired," "desire expressed."

The testatrix by the will appears to me to have said in substance to Miss Penny, "I give you the residue, believing and trusting that you will dispose of it in accordance with my design, intentions, and desire;" and this in a will, in a prior part of which the testatrix had treated the appointment of the executorship as a burthen and charge, by the words "in addition, for the trouble she will have in acting as my executrix."

According, however, to the proper construction of the

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words "my views and wishes," understood as I have said, (and considered in connection with the context,) do they also mean "views and wishes" that were designed to be, or that had been, communicated by the testatrix to Miss Penny, either in writing or verbally, but otherwise than by the will? I am of opinion that they do; understanding the expression "communicated by the testatrix to Miss Penny" as extending, though not necessarily confined, to any paper on the subject that might be left for the purpose by the testatrix at her death. Miss Penny could of course not execute a plan of which she was left in ignorance; and, except from the testatrix's information, the scheme of the testatrix could not be known.

If I am right in thus reading the will, does it or does it not exhibit an intention, that, merely by virtue of the will (without more) Miss Penny should not take the residue beneficially? I think that it does exhibit such an intention. I think in effect that by it the residue is given to that lady, not necessarily for her benefit wholly or in part, but is given to her for a purpose possibly not for her benefit wholly or partially, that is to say, for a purpose of which the instrument does not contain explanation or disclosure, but refers for the explanation and disclosure to some other source of information past, present, or future.

Supposing, then, that source of information to fail, supposing the explanation and disclosure to be not obtained, and to be unattainable—the executrix, being also the residuary legatee, must be treated, in my judgment, as holding the residue in trust for the next of kin; a conclusion which appears to me not opposed to *Gibbs v. Rumsey* (a), *Lechmere v. Lavie* (b), and *Wood v. Cox* (c), or any of the authorities cited at the bar during the argument, but is probably, if I rightly interpret the will, necessary in order to avoid a departure at least from some of them.

I may observe that, in *Wood v. Cox*, the will contained

(a) 2 V. & B. 294. (b) 2 My. & K. 197. (c) 2 My. & Cr. 684.

the words "for his and their own use and benefit for ever;" and though it contained the word "wishes," the codicil or additional testamentary paper had the word "wish;" and the Lord Chancellor appears to have thought that the latter was to be considered as declaring and explaining the "wishes" mentioned in the will, and that the gift to Mr. George Cox was not a gift upon trust, but a gift subject to a charge.

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In the case of *Mordaunt v. Hussey* (a) which occurred long before the statute of 1 Will. 4, the then Lord Chancellor thus expressed himself: "upon the whole disposition the testatrix has made, she has reserved an ulterior disposition of the residue: that ulterior disposition being either not made or not known to be made, of course the executors can claim nothing." The cases of *Morice v. Bishop of Durham* (b), *Lord Cranley v. Hale* (c), *Mence v. Mence* (d), *Gerard v. Hanbury* (e), and *Ellis v. Selby* (f), are decisions, or contain at least observations by Lord Eldon, by Sir W. Grant, and by the present Lord Chancellor, which I think have a bearing, and as to some of them a strong bearing, on this. Nor are *Ommaney v. Butcher* (g) and *Vesey v. Jamson* (h), nor perhaps *Braddon v. Farrand* (i), inapplicable. And in the judgment delivered by Sir J. Wigram in the case of the Corporation of Gloucester, I find these two passages: "Upon the cases I have referred to, the plaintiffs founded the general proposition, that if a will contains an absolute gift to an individual, that individual must take for his own benefit, unless, by other parts of the will, that absolute gift is, with certainty, reduced to a trust. Now, after repeated consideration of this case, it appears to me, as it did during the argument, that the cases referred to have no appli-

(a) 4 Ves. 117.

(b) 10 Ves. 522.

(c) 14 Ves. 307.

(d) 18 Ves. 348.

(e) 3 Mer. 150.

(f) 1 My. & Cr. 286.

(g) T. & R. 260.

(h) 1 S. & S. 69.

(i) 4 Russ. 87.

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cation to a case like that before me. Those cases suppose the whole intention of the testator, so far as he has committed it to writing, to be before the Court. In such cases it may be right (in the first class referred to) to hold that a gift, in one part of a will, to an individual, in terms which, if uncontrolled by the context, would give him an absolute interest, shall not be reduced to a trust by equivocal expressions in another part of the will; and (in cases of the second class) it may be a sound rule of law, that a gift which, if uncontrolled by the context, would give an absolute interest, shall not be reduced to a trust by a mere recommendation to the legatee to give an unascertained part of the legacy to an individual, or any part of the legacy to an unascertained object. But I confess my inability to apply the reasoning upon which those cases are founded to a case like the present, in which the difficulty arises from this—that the Court has not the expressions of the testator before it for its guidance. I cannot accede to the proposition which was urged upon me, that, because, in both classes of cases referred to, uncertainty (in a sense) is the foundation of the judgment of the Court in favour of the legatee, excluding trust, it is immaterial what the cause of uncertainty in any other case may be. The testator tells me, in the third codicil, that his ascertained intentions are declared in another place; those ascertained intentions are not before me; and the plaintiff's argument requires me to believe, that, if those intentions were brought before me, the case would necessarily fall within one or other of the cases I have mentioned. Taking this, then, as the case of a legacy to an individual, I am satisfied I should be making and not expounding a will, if I were to give the plaintiffs the decree they ask, so far as the 60,000*l.* is concerned." "But no rule of law can be better settled than this—that unless the legatee intended to be benefited by a particular bequest can be ascertained, the mere intention that

the residuary legatees of a testator should not take will be inoperative. The whole doctrine of lapsed legacies assumes that the interests of residuary legatees are abridged only in favour of particular legatees; and if the particular legacies fail, the residuary legatees take the whole."

The Vice-Chancellor was dealing with a question upon a particular legacy given (in effect, as it was successfully contended) to an unascertained legatee. But with reference to a claim of residue by a testator's next of kin (at least since the statute of 1 Will. 4), it may be equally asserted, that such a claim does not need the existence of intention in his favour, does not require the absence of expressed intention against him, but sustains itself where there is an inability to shew, by any means which our laws allow, the existence, in another's favour, of a settled intention, legitimate in its nature, expressed intelligibly, and capable of execution.

Lastly, upon the appeal from the decision just mentioned, Lord *Lyndhurst* is reported as saying, "But the former codicil is not produced; no account is given of it; and we have, therefore, no means of ascertaining the purpose for which the gift was made, or to what it is to be applied. In the same sentence in which the legacy is given, and immediately after the words of gift, the gift is stated to be for a purpose which the testator had defined, but which is wholly unknown, and cannot be discovered. How, then, could the legatee be allowed to take the legacy for his own use? The purpose is a qualification of the legacy; it is an essential part of it; and till this is ascertained, it is wholly uncertain what the legatee is to take, whether for his own benefit or for the benefit of others, and for whom, whether for private purposes or for public or charitable objects. It is, therefore, I think, clear, that if the legacy had been to an individual, it must have altogether failed. What the testator intended—whom he meant to benefit—does not appear, and cannot be ascertained."

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I proceed to the question, whether this testatrix has, in an effectual or available manner, explained or disclosed, wholly or to any extent, her "views and wishes," that is to say, as I read her will, the purpose for which it gave the residue of her personal estate to Miss Penny.

The only evidence in the cause, exclusively of the probate and the four papers marked B, C, D., and E., consists of the answer; which affords probably accurate information, and beyond which it is probable that there cannot be obtained, and does not exist, any useful information, either upon the subject of the intent or object of the residuary bequest, or with reference to any one of the papers marked B, C, D., and E.

The only parts of the answer to which it can be material to refer for any present purpose seem to be the following passages: [His Honor read the passages, the substance of which is stated ante, pp. 529, 530.]

It is not, therefore, admitted or proved, nor do I think it likely to be proveable, that the testatrix made or gave, communicated or left, any explanation or disclosure, wholly or partially, of her "views and wishes" mentioned in the will, save so far, if at all, as the papers marked B, C, D., and E. contain any such explanation or disclosure; or that any one of those four papers was written before the making of the will, or before the year 1838. I mention the year 1838 with reference to the Act passed in 1837, "for the Amendment of the Laws with respect to Wills."

But is either of the four papers available or effectual for any purpose? Assuming, as the Ecclesiastical Court is said to have held, and as, at present, I consider at least highly probable, that each of them was written in or after the year 1838, I do not (considering the statute of 1837) think that any one of them can be treated as of any avail or efficacy, for any purpose; whether, if the statute of 1837 had not passed, any one of them might properly have been admitted to probate, is a question, which, upon the facts, so far as they appear, and upon the cases decided at Doc-

tors' Commons, and on appeal from Doctors' Commons, so far as I am acquainted with them, may, perhaps, be thought disputable; but, however this may be, the statute of 1837 seems to me to exclude them. Before that statute (I need not particularly refer to cases such as *Adlington v. Cann* (a), *Habergham v. Vincent* (b), *Muckleston v. Brown* (c), and *Stickland v. Aldridge* (d)), a man could not, by his will, enable himself to devise freehold estates by an unattested codicil. But the rule may, I conceive, be more largely stated. I apprehend that a testator, by a will, whether made before 1838, or after the commencement of that year, could not enable himself to make a disposition of any part of his property by any means which, if the will had not been made, he could not effectually have used; nor do I recollect any exception or qualification, beyond the well-known one, as to affecting real estate by means of a will with debts incurred and legacies given after it, which is now restricted, so far as the statute requires particular formalities for the effectual gift of a legacy. The power of a testator to incorporate in his will another existing paper, which the will, by specific reference and description, identifies; and the prevention of fraud, by compelling a legatee to perform, after the testator's death, a promise made by him to the testator, upon the faith of which the testator, to the knowledge of the legatee, gave the legacy, are scarcely exceptions or qualifications.

The four papers under consideration being assumed not to have existed before 1838, being not testamentary, and being unattested, can, as I conceive, have only such effect, if any, upon Miss Harley's property, as they would have had if she had died intestate. But would any one of them in that case have been of any force or efficacy as an agreement, a gift, or a declaration of trust, or in any other

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(a) 3 Atk. 141.

(c) 6 Ves. 52.

(b) 2 Ves. jun. 204; 4 Bro. C.C. 353. (d) 9 Ves. 516.

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manner? I am not aware of a ground or principle on which that question can be answered otherwise than in the negative.

It follows, that, subject to the considerations that I am about to mention, I must hold the plaintiffs entitled to an administration decree. It may be as unnecessary formally, as it is substantially, to direct an inquiry whom the testatrix left her next of kin; though of this I am not quite sure.

But can it in point of form at least or indeed in point of substance be, even upon this record, right to make an administration decree without ascertaining by means of a report, whether the testatrix explained or disclosed the "views and wishes" mentioned in her will, and in what manner, if at all? Is it, even upon this record, certainly right to assume the total invalidity of the four papers?

If not, will it be correct to declare the decree to be without prejudice to the rights (if any) of persons not parties, though no such person probably could, even without a declaration of that kind, be precluded by the decree; and the case is not perhaps within the 40th Order of the 26th of August, 1841; or what course should, with regard to the four papers, be taken?

These are points on which I shall be glad to receive any suggestions from the bar.

In the absence of any such suggestions, the decree that I am disposed to make is to this effect:—

To declare that the testatrix bequeathed the residue of her personal estate to the defendant as a trustee for some purpose or purposes, which the will and codicils of the testatrix do not disclose, and the nature of which does not at present appear.

Refer it to the Master to inquire and state whether the views and wishes concerning the disposition of such residue, which are mentioned in her will, were ever and when declared or made known by her in or by any instruments,

papers, or writings, or instrument, paper, or writing. And, if the Master shall so find, he is to state what the same was or were, and the particulars and circumstances thereof; and, if the Master shall not so find, then a common administration decree, with the addition of liberty to him to state any circumstances specially.

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An appeal from this decision has been heard before the present Lord Chancellor, and dismissed, with costs. *3 All. 430 546.*

Ex parte JOHN HOOKINS,

Jan. 24th

In the Matter of SAMUEL GUNDRY and WALTER EUSTACE GUNDRY, Bankrupts.

THIS was a petition by way of appeal from the rejection of a proof upon two bonds, under the following circumstances:—

The bankrupts carried on business as bankers at Bridport.

In September, 1812, the bankrupt Samuel Gundry gave to his sister Mrs. Hookins a bond to secure 3000*l.*; the consideration for which was stated by the petition to be, a promise made by Samuel Gundry to his father, on his death-bed, to provide for Mrs. Hookins, the father having left nearly all his property to the bankrupt Samuel Gundry. Upon the bond it was expressed to be agreed that the principal money should not be called in until five years after the death of the bankrupt Samuel Gundry. The bankrupt Samuel Gundry regularly paid the interest on the bond till the death of Mrs. Hookins, which took place in 1841. By her will she bequeathed all her property to her three children, one of whom and the husband of an-

A partner in bank gave a bond to his sister in performance, as it was alleged, of a promise voluntarily made to their father on his death-bed. The sister died, having specifically bequeathed the sum secured by the bond. The bankrupt gave the legatees fresh bonds for sums amounting together to the sum secured by the original bond, in consideration of the delivery up of that instrument. Six years afterwards, the partners in the bank, including

the obligor, became bankrupt; and it appeared that, at the times of both the transactions, the firm must have been insolvent, and that the obligor must have then known or suspected this to be the case; but that the transactions were entered into fairly, and without reference to this circumstance. There was no evidence, however, of any notice or suspicion on the part of the obligees:—*Held*, that they were entitled to prove upon the bonds.

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other she appointed her executors. Sometime after her death the bankrupt gave to each of these legatees a bond for 1000*l.*, payable at the expiration of five years from his death, with interest in the meantime, in consideration of their delivering up the original bond and releasing him in respect of it. The bankruptcy took place in 1847; and under the fiat the obligees in two of the substituted bonds tendered upon them the proofs now in question.

Mr. *Russell* and Mr. *E. W. Cox*, for the appellants.

The VICE-CHANCELLOR referred to *Ex parte Berry* (a) and said, that at present he only desired to hear the appellants' counsel on the question relating to the bankrupt's circumstances when he gave the substituted bonds.

Mr. *Russell* and Mr. *E. W. Cox*.—In *Ex parte Berry*, the first bond was voluntary, and it appears that the bankrupt had called a meeting of his creditors; yet Lord *Eldon* said: "the first bond was clearly good as between the obligor and obligee; and, had payment been enforced by process of law upon that security, it is very difficult to maintain that the money paid could have been recovered. The obligee, instead of payment, gives another bond which was not voluntary, being given upon cancelling the former security."

This case is a decision in favour of the proof, unless there is a want of good faith in the transaction, as where it is a mere attempt to substitute a valid for an invalid security. There is no proof here of any such want of good faith, or indeed of insolvency at the time; for the bank stood its ground for six years after the transaction. There is no allegation that they dishonoured a bill or refused a cheque during the whole of this period.

Mr. *Swanston* and Mr. *Shapter* for the assignees.—During the whole six years the bankrupts were insolvent, and knew themselves to be so. They never ceased to be insolvent during the whole period. From 1825 the history of this bank is a continued state of insolvency. In that year the deficiency appears to have been 36,000*l*. Now, it is clear, that if a man in a known state of insolvency gives a voluntary bond, the obligee cannot prove in competition with creditors for valuable consideration. [The *Vice-Chancellor*.—I assume, at present, that the original bond was given voluntarily, but not unfairly (a).] That is sufficient for our case, for the bankrupt knew the state of his own circumstances; and it is not necessary, to invalidate the bond against creditors for value, that the obligee should have known them also. *Ex parte Berry* (b) is conclusive in our favour, for it appears from the report, that, after making the observations which have been read on the other side, Lord *Eldon*, on learning that there was an affidavit of the bankrupt's insolvency when the second bond was given, said, that he could do nothing for the bond creditor. [The *Vice-Chancellor*.—From the marginal note it would seem, that the impression made by that case upon the reporter's mind was, that the circumstance of the insolvency by itself was not enough.] Or it may be, that the reporter considered the proposition in the marginal note to be sufficiently established by the fact of insolvency. There may be fraud in equity without actual moral turpitude.

The VICE-CHANCELLOR, in the course of the argument, asked for the affidavits in *Ex parte Berry*. But there did not appear to have been any affidavit except the ordinary affidavit of service of the petition. His Honor said, therefore, that he supposed it was argued upon admissions.

(a) See *Ex parte Mudie*, 3 Mont. idge, 5 Taunt. 36.
D. & D. 66; and *Lee v. Mugger-* (b) 19 Ves. 218.

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At the conclusion of the argument, his Honor said—

My impression of the case *Ex parte Berry* is, that Lord Eldon did not act upon the mere evidence of insolvency, but inferred, that the second security had been given, not only with a knowledge of the failing circumstances of the obligor, but with a view to bankruptcy, and for the purpose of assisting and improving the case of the obligee. So understanding the case of *Ex parte Berry*, I entirely agree with it. If I had understood it otherwise, I should follow the authority.

In the present case, I do not understand it to be suggested, that either of the obligees had, at the date of the bonds, any knowledge or notice of the insolvency or failing circumstances of Samuel Gundry or of the Bridport Bank, or intended to act fraudulently or unfairly. That I take to be the state of the evidence as to the obligees. Then with regard to the obligor, it may be, that he at least suspected the bad circumstances of his firm, or would have done so, if his attention had been directed to the matter; but I believe that neither his pecuniary circumstances, nor the circumstances of his house, entered into his motives in giving the bonds. I believe, that, on his part, the transaction was not in the slightest degree connected with actual or apprehended insolvency or bankruptcy, or with any view or notion that would not equally have been in his mind, if he had been one of the wealthiest men in England. I consider the transaction to have been fair in every respect, and in no sense with the view or intention of bettering the case of the obligees as against the general creditors of the obligor the bankrupt.

That being so, I think that the proof must be admitted; I repeat that I would not so decide, were I of opinion that, by doing so, I should be contravening Lord Eldon's opinion in *Ex parte Berry*.

I hardly consider myself as differing from the Commis-

sioner; I have not the same evidence as he had; and he seems rather to have left it to this Court to decide, than to have decided it himself.

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Ex parte MARTHA MILLER,

Jan. 24th.

In the Matter of CHARLES HENRY SWANN, JOHN SWANN,
and WILLIAM SWANN, Bankrupts.

THIS was the petition of an annuity creditor, seeking a valuation of her annuity, and the sale of certain copyhold lands, of which the documents of title were deposited to secure the annuity. It prayed, in the usual form, the application of the proceeds of the sale in payment of the value of the annuity, and leave to prove for the difference.

The only question was, whether the securities for the annuity were sufficiently enrolled.

The securities were, first, a bond, dated April 11, 1835, whereby, in consideration of 500*l.* paid to the bankrupt John Swann by the petitioner, the bankrupts John Swann and William Swann, and their father, since deceased, became jointly and severally bound to the petitioner in the penal sum of 500*l.*, subject to a condition making the bond void on punctual payment of an annuity of 60*l.* to the petitioner for her life. Secondly, the deposit, by the bankrupt, with the petitioner of the title deeds of a copyhold estate, with a written memorandum, expressing that the deposit was made by way of further security for the payment of the annuity.

A memorial of the bond was duly enrolled in Chancery, in pursuance of the 53 Geo. 3, c. 141; but the memorandum of deposit was not noticed.

Mr. *Webb*, in support of the petition.—It is not neces-

Documents of title were deposited, with a written memorandum expressing that they were deposited to secure an annuity, also secured by bond. The bond was enrolled but not the memorandum. The Court declined to direct a sale of the property comprised in the security.

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Ex parte
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sary that the memorandum of deposit should be enrolled. In *Morris v. Jones* (a), there was a grant of an annuity which was enrolled, and there was an assignment of certain policies, which were to be re-assigned on redemption of the annuity. It was there contended, that, as these policies were of considerable value, the assignment ought to have been enrolled; and that, for want of enrolment, the grant of the annuity was void. But the Court of Queen's Bench held otherwise. The explanatory Act of 3 Geo. 4, c. 92, expressly provides (sect. 2) that a deed granting an annuity, if duly enrolled, shall be valid, although some other deed securing the annuity is not enrolled.—He also referred to *Doe v. Bingham* (b).

Mr. *Russell* for the assignees.—There is no substantial difference between the Acts 53 Geo. 3, c. 141, and 3 Geo. 4, c. 92; all that the 2nd section of the latter Act declares is, that the want of enrolment of one deed shall not invalidate another. But it is upon the unenrolled security that the present order is sought.—He referred to *Rosher v. Hurdis* (c), and *Sandilands v. Marsh* (d).

Mr. *Webb*, in reply, submitted, that, as the deposit would have been good without a memorandum, the want of enrolment of that document could not affect the case, except as to costs.

The VICE-CHANCELLOR:

I think that there is, for this purpose, no substantial difference between the two Acts. I will, however, give the petitioner the opportunity of entering a claim and filing a bill; and, unless she should do so within a limited time, the petition must be dismissed, with costs.

(a) 2 B & C. 232.

(b) 4 B. & Ald. 672.

(c) 5 T. R. 678.

(d) 2 B. & Ald. 673.

1849.

Jan. 24th.

Ex parte WILLIAM PENNELL and Others,
In the Matter of JOSEPH TURNER, a Bankrupt.

THE fiat was issued on the 18th of January, 1848.

On the 2nd of November, 1848, the bankrupt presented his petition for leave to surrender, and that the costs of the petitioner might be paid out of the estate. In support of that petition, the petitioner made an affidavit, that he left England for the Cape of Good Hope in 1847, on account of family disagreements; and that, at that time, he believed there were ample funds to pay all his creditors twenty shillings in the pound; that he returned to England on the 9th of September, 1848, and had no notice before the 10th of September, 1848, of the fiat.

On the 15th of November, 1848, an order was made upon this petition, which was not opposed by the assignees, giving leave to the bankrupt to surrender, and directing payment of the costs of the bankrupt and of the assignees out of the estate.

The assignees now presented a petition, stating, that on the 8th of December, 1848, a sitting was held for the surrender, in pursuance of the order of the Court; and that the bankrupt then stated, that, finding he was embarrassed in his pecuniary circumstances, and had many bills then becoming due, and having received a threatening letter from one of his principal creditors, he, on or about the 14th day of December, left England, without notice to his wife or family, and sailed for the Cape of Good Hope; that he had previously had disputes with his wife's father on pecuniary matters; but that his reason for quitting England was the embarrassed state of his affairs. That he also stated that, on leaving his place of business, he took with him various goods, consisting of cutlery, guns, bridles, and whips, for the sale of which he afterwards obtained, in different places at the Cape, 140*l.*; and that he took with him, in money,

A bankrupt obtained an order for leave to surrender, and for his costs to be paid out of the estate, on a petition supported by his affidavit, stating, that his surrender had been prevented by his having left England on account of family disagreements. The petition was unopposed. On appearing before the Commissioner to surrender, he was examined, and stated that he left England on account of his embarrassments. The assignees thereupon petitioned to have the former order discharged; but the Court refused to discharge it, holding that the circumstance would be properly regarded when the bankrupt applied for his certificate.

1849.

Ex parte
PENNELL,
In re
TURNER.

about 100*l*. The petition stated, that the Commissioner thereupon refused to take the surrender, and certified as follows:—"I have declined to take such surrender, inasmuch as the reason assigned by the bankrupt, on examination this day before me, for absenting himself from his place of business and departing this realm, is inconsistent with his affidavit, made in support of his petition to his Honor Vice-Chancellor *Knight Bruce* for leave to surrender."

The prayer of the present petition was, that the order of the 15th of November, 1848, might be discharged; and that all the costs of the former petition and of the petition now presented, might be paid by the bankrupt personally.

Mr. *Swanston* and Mr. *Sheffield* for the petition.

Mr. *Thomas* for the bankrupt.

The VICE-CHANCELLOR:—

This question may be properly raised when the bankrupt shall apply for his certificate. He may never deserve his certificate; but that is not the question before me.

If the assignees had asked that the bankrupt should be examined, when he obtained the order to surrender, I might have ordered that to be done. As it is, I think the proper course is to dismiss this petition, with costs. I may add, however, that I do not intend my decision to have the effect of preventing the Commissioner from giving the costs of this petition to the assignees out of the estate, if he should so think fit.

1849.

Ex parte CHARLES STEWART,
In the Matter of CHARLES STEWART.

Feb. 19th.
May 2nd.

THIS was a petition to have a fiat which had issued against the petitioner annulled for want of trading, under the following circumstances, as appearing upon the affidavits.

The petitioner was a barrister, and in 1842 became the lessee of two pieces of building ground, one at Notting-hill, and another at Shepherd's-bush. He entered into a contract with a builder, who thereby agreed to build on the ground a certain number of houses at a stated price.

This contract was afterwards abandoned, and the petitioner proceeded to build upon the ground 200 houses, purchasing the materials for this purpose.

As the houses were completed he let them; and, in the course of his dealings, with reference to these undertakings, he accepted a bill, addressed to him as "Mr. Stewart, builder."

He also brought an action of slander, on the ground that the slanderous expressions complained of had a tendency to injure him in his character of a trader subject to the bankrupt laws.

Mr. *Russell* and Mr. *Bramwell*, in support of the petition, contended, that a person who built houses for the purpose of letting them could not be considered a "builder" within the meaning of the Act.

The VICE-CHANCELLOR asked if there was any decision upon the point.

Mr. *Swanston* and Mr. *Bacon*, for the assignees, submitted, that the case was completely governed by *Ex parte*

A barrister, who took leases of three pieces of ground, and built houses upon them for the purpose of letting—*Held* not to be a builder within the meaning of the bankrupt laws; but, on it appearing that he had accepted a bill, addressed to him by the description of "builder," and had brought an action for slander, on the ground that the word complained of injured him as a trader, the fiat was annulled without costs.

1849.
Ex parte
 STEWART,
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Neirinckx (a). *Ex parte Edwards* (b) was also referred to.

The VICE-CHANCELLOR:—

Having before me the case referred to, I cannot annul the fiat. I can only give liberty to the petitioner to bring an action for the purpose of having the question tried at law.

The petition was ordered to stand over, with liberty for the petitioner to bring an action.

May 2nd.

The petition now came on to be disposed of, an action having been brought, and the jury having found against the trading. At the trial, the Judge (Mr. Baron *Parke*), put to the jury three questions:—

First, whether there was evidence of the plaintiff having sold timber, sand, and other materials for profit? Secondly, whether the plaintiff was a builder in this sense, ready to build a house for any one who would give him an order for that purpose? Thirdly, whether the plaintiff, after building the houses at Shepherd's-bush, Notting-hill, and others, which it appeared that he had built in Bolton-row, meant to confine himself to those three instances; or whether he had an intention, generally, to enter into other building speculations?

The jury found, that the plaintiff did not buy and sell timber, sand, and other materials with a view to make a profit; secondly, that the plaintiff was not a builder in the sense of being ready to build a house for any one who might give him an order for the purpose; and, thirdly, that the plaintiff intended to confine himself to the three instances of building mentioned in the third ques-

(a) 2 Mont. & A. 384, 542.

(b) 1 Mont. D. & De Gex, 3.

tion, and had no intention of entering generally into other building speculations; and they thereupon found a verdict for the plaintiff.

A motion for a new trial was refused in Easter Term following, when Mr. Baron *Parks* observed, that he had put the third question to the jury with reference to the observations of the Chief Judge in *Ex parte Neirinckx*; and also, that he had so much doubt as to the question, whether Mr. Stewart was a builder within the meaning of the bankrupt laws, that, if the jury had found that he was a builder, he should have reserved that question for the opinion of the Court.

Mr. *Russell* and Mr. *Bramwell* now asked, that the fiat might be annulled.

Mr. *Swanston* contended, that the questions put by the learned Judge did not fairly raise the point in dispute. He also objected that the petitioner had withheld his books from his assignees, at the trial; so that the evidence was not fully before the jury.

The VICE-CHANCELLOR:—

In the first place, I am of opinion, that the finding of the jury is correct, with reference to the evidence before them. So treating that, I have next to consider, whether, if the books, which have been the subject of observation to-day, had been in the possession of the defendants at law in sufficient time before the trial, and had been laid before the jury, with all the observations properly belonging to them, there would have been further evidence before them, such as ought to have made a difference in the answer to any of the three questions put to them by the learned Judge; I am of opinion that there would not. I think that it would not have been right to make any difference in the verdict on the ground of any such addition to the evidence.

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Ex parte
 STEWART,
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Next, it has been argued, that the three questions put to the jury did not exhaust the subject; and that, in particular, the third question ought to have been altered or added to. I am of opinion that, assuming the jury to have correctly answered the other questions put to them, whatever answer they might have given to the third question as altered in the manner now proposed on behalf of the respondents, it would have made no difference, and I should have held still, as I now hold, that this gentleman was not a builder within the meaning of the Act.

On the whole, I am satisfied, that this fiat is bad in law, and must be annulled. As to the costs, without saying whether the ruling of the learned Judge at the trial, or the ruling of the Court of Exchequer upon the application for a rule nisi for a new trial, or any decision now on this fiat that it must be annulled, is consistent or inconsistent with the case *Ex parte Neirinckx*, it is impossible to say, on this question of costs, that the existence of that case is a matter to be forgotten. To this consideration are to be added these, that this gentleman has accepted a bill drawn upon him by the description of "Mr. Stewart, builder," and has brought an action with a declaration, in which he has described himself as a trader subject to the bankrupt laws. The consequence is, that I shall give the successful party here no costs up to the time of my order directing or allowing the trial, inclusive. The costs since must be paid by the petitioning creditor.

Ordered accordingly; and that the costs of the trial, not exceeding 50*l.*, should be paid by the petitioning creditor, who was to be at liberty to set off against them the debt due to him from the petitioner.

1849.

Ex parte ROWLAND EVANS and Others,
In the Matter of JOHN FOSTER, a Bankrupt.

Feb. 14th.

1850.

May 1st.

BY an indenture, dated the 13th of July, 1841, and made between William Aggas of the first part, the bankrupt of the second part, Maria Foster his daughter of the third part, and the petitioners of the fourth part, being the settlement which was executed prior to and in contemplation of the marriage between William Aggas and Maria Foster, the bankrupt covenanted with the petitioners, their executors, administrators, and assigns, that in case the intended marriage should be solemnised, the bankrupt, his heirs, executors, or administrators would pay or cause to be paid to the petitioners, their executors, administrators, or assigns, during such time, and so long as William Aggas and Maria Foster, or either of them, or any issue of the said intended marriage, immediately entitled under the provisions thereafter contained, should be living, an annuity of such an amount, as either alone, until any real or personal estate should devolve upon or vest in the said William Aggas and Maria Foster in her right, or any issue of the said intended marriage, under the said settlement of her said father and mother and the said thereinbefore-mentioned will or either of them or otherwise howsoever, or together with the clear annual produce to arise or be payable from any such real or personal estate, or both real and personal estate, as the case may be, after any such devolution or vesting as aforesaid should take place for the time being, would from time to time make up one full annuity or yearly sum of 150*l*.

A trader, upon his daughter's marriage, covenanted to pay, so long as the intended husband and wife, or any issue of the marriage, entitled under the provisions of the settlement, should live, such a sum as with the annual produce of any property which might be received as therein mentioned, would amount to 150*l*.:—*Held*, that the payments of the annuity becoming due after the issuing of a fiat against the trader could not be proved.

The marriage took place, and no real or personal estate had yet devolved upon or become vested in William Aggas and Maria his wife in her right or any issue of them, or

Ex parte Meyer 6 D. M. R. 700.

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the petitioners, under or by virtue of the settlement, or otherwise howsoever.

On the 24th of October, 1842, the fiat issued.

On the 25th of March, 1843, the petitioners tendered a proof under the said fiat against the separate estate of the said John Foster for the value of the annuity, as a contingent debt; but such proof was rejected, on the ground that the contingencies on which the said annuity depended were such, that the value of the said annuity could not be ascertained.

At the date of the fiat 42*l.* 8*s.* 4*d.* was due and owing to the petitioners for arrears of the annuity; and on the 25th day of March, 1843, there was due and owing to them the sum of 105*l.*, including the amount of such arrears and a proportional part of the current half year up to the time of tendering the proof; and the petitioners were on that day allowed to prove, and were admitted as creditors, against the separate estate of the said bankrupt for that amount.

Under the joint estate dividends, amounting in the whole to 6*s.* 1*d.* in the pound, have been paid to the joint creditors.

The creditors upon the separate estate, including the petitioners, in respect of their said claim for 105*l.*, were paid in full, and a surplus from his separate estate was carried over to the credit of the joint estate.

On the 6th of March, 1843, the bankrupt obtained his certificate.

In and during the year 1848, and after the above distribution as aforesaid, a further sum of 121*l.* 4*s.* 6*d.* was received by the official assignee as part of the separate estate of the bankrupt, to which he became entitled in right of his wife.

The whole of the said annuity of 150*l.* per annum had continued to be, and still is, payable under and by virtue of the said indenture; and the instalments which accrued

due after the date of the above-mentioned proof down to the 21st of September, 1848, amounted to 823*l.* 16*s.* 8*d.*

The petitioners tendered a proof for the balance due in respect of this amount after deducting some payments which had been made by the bankrupt; but the Commissioner rejected the proof, because no case had been produced to him in which payments periodically accruing after the date of the bankruptcy had been admitted to proof.

The present petition was then presented, praying that the petitioners might be admitted creditors for 703*l.* 16*s.* 10*d.*, the above-mentioned balance, and might receive dividends thereon (not disturbing former dividends).

Mr. *Hardy*, in support of the petition, cited *Re Gales* (a), *Ex parte Myers* (b), *Ex parte Grundy* (c), *Ex parte Marshall* (d), *Thompson v. Thompson* (e).

An unreported case, before the Subdivision Court, of *Re Whitmore* (f), was referred to as containing a summary of the authorities, and as shewing, that in *Ex parte Grundy* the general point was taken, although it does not so appear by the report.

Mr. *J. Russell*, amicus curiæ, confirmed this statement.

The VICE-CHANCELLOR said, that the case did not seem to fall within the 56th section of 6 Geo. 4, c. 16, or within any other, as far as it appeared; and that he could not decide in favour of the proof without the opinion of a Court of law being obtained.

(a) 1 De G. 100.

(b) Mont. & B. 229.

(c) Mont. & M. 293.

(d) 1 Mont. & A. 118.

(e) 2 Bing. N. C. 169; and see

2 D. & C. 126.

(f) See the next case.

1849.

Ex parte
EVANS,
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1849.
Es parte
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FOSTER.

A case, embodying the foregoing statement, was accordingly directed for the opinion of the Court of Common Pleas upon the following question:—

Whether the said Rowland Evans, Thomas Foster, and Charles Crompton are entitled to prove against the separate estate of John Foster (the bankrupt), in respect of the said annuity, for the instalments thereof accrued since the 25th day of March, 1843, the date of the first mentioned proof, or any or either of them, and receive dividends with the other creditors, not disturbing any former dividends?.

The following certificate was sent by the Court of Common Pleas.

“This case has been argued before us by counsel. We have considered it, and are of opinion that Rowland Evans, Thomas Foster, and Charles Crompton, are not entitled to prove against the separate estate for the instalments mentioned in this question.

W. H. MAULE,
C. CRESSWELL,
E. W. VAUGHAN WILLIAMS,
T. N. TALFOURD.”

1850.
May 1st.

Upon the case coming back upon the certificate, the VICE-CHANCELLOR dismissed the petition, but directed the costs of both parties to be paid by the assignees, they consenting thereto.

1843.

In the Matter of WHITMORE, WELLS, and Others.

Feb. 18th.

IN this case, a proof was tendered, upon a covenant of the bankrupt Whitmore; and the case now came on for judgment in a Sub-division Court, consisting of Mr. Commissioner *Merivale*, Mr. Commissioner *Fonblanque*, and Mr. Commissioner *Holroyd*.

The facts appear in the judgment.

Mr. Commissioner *Merivale* pronounced the judgment of the Court as follows:—

The question in this case arises out of a settlement on the bankrupt's marriage, by which, after reciting an agreement on the part of the lady's father, to secure to the trustees of the settlement the principal sum of 4000*l.*, to be paid to them, together with interest, within a limited period; and further reciting, that it had been agreed, on the part of the bankrupt, that he should, by assignment of two certain policies of assurance on his life, secure to the trustees the principal sum of 5000*l.*, to be paid to them within three months after his death; and that they (the trustees) should stand possessed of the said two sums of 4000*l.* and 5000*l.* on the trusts thereafter mentioned; and after further reciting that the lady's father had, in pursuance of his agreement, executed a bond to the trustees for the payment of the 4000*l.* within one year after the marriage, it was declared, that the trustees should stand possessed of the said 4000*l.* upon trust, to suffer the same to remain on the security of the bond until six months after the death of the father, and then to sell and invest, and stand possessed of the securities upon the usual trusts of the settlement; and it was further witnessed, that the bankrupt thereby sold and assigned to the trustees the said two policies, to be held on the trusts after mentioned, appointing them his attorneys to recover the principal monies, and covenanting that he (the bankrupt) would pay the premiums, and produce to the trustees his receipts, and would also repay to the trustees any sums which they might have advanced in payment of premiums, in case of his making default; and, lastly, to do all such further acts as might be reasonably required for more effectually assigning the policies. The settlement contained a proviso for the purpose of preventing forfeiture, whereby the trustees were empowered, whenever they should think it expedient, to pay the premiums out of the interest of the 4000*l.* or of the securities on which it might be invested; and also another proviso, that if the bankrupt should, at any time during his life, pay to the trustees the two principal sums of 2000*l.* and 3000*l.*, secured by the policies, the trustees should re-assign to him the policies; and it was further declared and agreed, that the trus-

A trader covenanted by an antenuptial settlement to pay the premiums on certain assigned policies of insurance on his life, or, if he failed to do so, to repay to the trustees the amount which they should pay in respect of the premiums. On his becoming bankrupt—*Held*, that the trustees could not prove for the amount required by the offices to be paid to keep up the policies during the remainder of the bankrupt's life.

1843.

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WHITMORE.

Court of Review; and as this is the case which seems most in point with the present of all those which have now been cited, I will shortly state the substance of it. It was the case of a covenant by A. for payment by B. of the premiums on a policy effected to secure a debt due from B. to the plaintiff. The premium becoming due was paid neither by B. (who had become bankrupt), nor by A., but the plaintiff himself paid it; and A. having in the meantime also become bankrupt, and having obtained his certificate, it was held, that the certificate was no discharge from the payment of the premiums. It is unnecessary to express an opinion as to what might have been our decision if the proof here had been otherwise presented to us; but the parties have, in this case, been advised to exhibit it in this shape, namely,—for the value of the policies, estimated according to the amount of the premiums. And it is argued, that this is an amount clearly capable of valuation; that, although there is strictly no debt, inasmuch as the covenant is to pay, not to the bankrupt, but to a third party, namely, the insurance company, yet, when it is considered that the policy has been made the subject of an absolute assignment, and that the covenant to pay is for the immediate benefit of those who are the objects of it, there can be no question that this is an obligation within the contemplation of the statute. There is, at least to my mind, much force in the reasoning in favour of the reception or admission of this proof, and sufficient, perhaps, to justify the expression of some desire that the provisions of the Act were extended to cases such as the present, of no unfrequent occurrence, undistinguishable in point of moral justice from those of *Ex parte Tindall*, and others already cited. But we apprehend that, whatever disposition may be felt to give effect to such an extension, it is too strongly opposed to the principle of a distinction between debts and mere liabilities, as it is laid down by the Chief Judge *Erskine* in the case of *Ex parte Marshall* (a), to be acted upon. In *La Coste v. Gilman* (b), a similar question to the present arose under the Insolvent Debtors Act, 51 Geo. 3, c. 125, s. 16; and it was contended, that premiums on a policy of insurance, payable after the 1st of May, 1811 (up to which day the Act operated in discharge, sect. 30), must be considered as sums of money payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, within that section; but the Court of Exchequer thought otherwise, and held, that the debtor was not exonerated as to such premiums by his discharge under the Act. In the case of *Bennett v. Burton* (c), a mortgagor, by a deed of mortgage for a debt of 1000*l.*, covenanted, as a further security, to insure his life for the mortgagee's

(a) 1 Mont. & A. 118; 3 D. & C. 139.

(b) 1 Price, 315.

(c) 12 A. & E. 657.

benefit, to deliver the policy to him, and to keep the premiums paid till the debt was discharged; and that if, in the meantime, the premiums should be in arrear, the mortgagor might pay them, and receive the amount from the mortgagee. The mortgagor afterwards took the benefit of the Insolvent Debtors Act, 7 Geo. 4, c. 57, and included the 1000*l.* in his schedule, stating also that the creditor held a policy of insurance on his life, with a joint security of A. B. for the payment of the premiums. It was held, that the mortgagor was not protected by his discharge, nor from an action of covenant at the suit of the mortgagee, for premiums becoming due after such discharge, and paid by the mortgagee on the mortgagor's default. Now, in the case upon which we have to decide, the bankrupt covenants to pay the insurance office certain premiums, and if he does not, the trustees may pay them, and he (the bankrupt) is to indemnify the trustees. It seems to us, that this indemnity is incapable of being estimated. If the trustees had paid a year's premium, and the bankrupt had died before the next premium became due, the amount of damage would have been the sum paid by the trustees; or it might have been, in addition to that, a fine imposed by the office for paying the premium too late. Again, if the bankrupt had died, and the payment of the last year's premium had been altogether omitted, the whole sum insured would have been lost. We think that this case is analogous to the cases of *Bennett v. Burton* and *La Coste v. Gilman*, and must be governed by them; but, independently of any authority, we also think that there was here no debt between the trustees and the bankrupt to which any of the clauses in the Bankrupt Act are applicable, and that, consequently, this proof must be rejected.

1843.

In re
WHITMORE.

1849.

March 5th.

Ex parte RICHARD CARRUTHERS and Others,
In the Matter of JONATHAN HIGGINSON and RICHARD DEAN,
Bankrupts.

A bill of exchange thus drawn—"Pay C. & Co. 7500*l.* value of same, which place against coffee per Vigilant:"—*Held* not sufficient to give a lien on the coffee for the amount of the bill.

THE petitioners were holders of a bill of exchange for 7500*l.*, drawn upon the bankrupts, in respect of a cargo of coffee, consigned to the bankrupts, by their orders, by Messrs. Lyon, Schwind, & Co., of Rio Janeiro. The bill was thus expressed: "Exchange, 7500*l.* sterling, Rio de Janeiro, 18th of September, 1847. At sixty days sight, pay this first of exchange, second, third, and fourth not paid, to the order of Messrs. Carruthers & Co., the sum of 7500*l.* sterling, value of same, which place to account against coffee per Vigilant, as advised by Lyon, Schwind & Co."

The bills of lading of the cargo were received by the bankrupts before the date of the fiat. The bill of exchange was not accepted, having arrived after the bankruptcy.

On the arrival of the cargo, the assignees of the bankrupts took possession of it. Their right to retain it was disputed by an indorsee of the bill of lading, and was the subject of an action (a). The petition prayed that the cargo might be sold, and that the amount due to the petitioners on the bill might be paid out of the proceeds.

Mr. Bacon and Mr. J. V. Prior contended, among other arguments, that the form of the bill was sufficient to give a lien; and that, as the bankrupts took the cargo with notice that this bill had been drawn upon them in that particular form, they must be held to have made the purchase on the footing of the agreement which the bill expressed, although they had not in form accepted the bill.—They

(a) See *Van Casteel v. Booker*, 18 L. J., Exch., 9.

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cited *Ex parte Waring* (a), *Ex parte Perfect* (b), *Ex parte Parr* (c), *Ex parte Gledstanes* (d), and *Burn v. Carvalho* (e).

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Mr. *Swanston*, Mr. *Russell*, Mr. *R. Palmer*, Mr. *Crompton*, Mr. *Greene*, and Mr. *Eddis*, for the respondents.—The language of the bill of exchange merely imports that it is to be carried to a particular account, and is insufficient to create a lien.

Mr. *Bacon*, in reply, was stopped by the Court.

The VICE-CHANCELLOR:

These petitioners may not be, and probably are not, bound by the judgment of the Court of Exchequer, obtained by the assignees in the action twice tried before special juries at Liverpool. But, leaving this judgment entirely out of consideration, I think that the case of contract, independently of the form and language of the bill, rests in too doubtful and obscure a state to render it possible to act on it.

With regard to the form and language of the bill, it must be recollected, as was urged by counsel, that it has never been accepted. Still its form and language may be such as to shew the object and intention with which the goods were placed on board the *Vigilant*, and with which possession was obtained by Barton, Irlam & Higginson, or the captain of the vessel, by means of that delivery. The language of the bill is capable of being explained not only in such a manner as to create a lien, but is open to another construction. It may be, that the true construction is, that the bill simply directs to what account it is to be placed. It may have been intended to give a lien; but I cannot act upon such a construction of the instrument.

I will not preclude the petitioners from instituting a

(a) 2 G. & J. 404.

(d) 3 Mont. D. & D. 109.

(b) Mont. 25.

(e) 4 My. & C. 690.

(c) 18 Ves. 65.

1849.

Ex parte
CARRUTHERS,
In re
HIGGINSON.

suit for establishing their claim, if they think fit so to do. Unless they establish it by a suit at law or in equity, I shall dismiss the petition without costs.

The order was for the petition to stand over, with liberty for the petitioners to bring an action or institute a suit; but if neither action nor suit should be commenced within six weeks, the petition was to stand dismissed.

Jan. 24th.
Feb. 1st.

Ex parte JARED TERRETT HUNT,
In the Matter of JOSEPH BUSST.

A declaration of insolvency followed by a fiat within two months, held to be an act of bankruptcy sufficient to support another fiat issued after that period, on the annulling of the former fiat.

THIS was the petition of the petitioning creditor.

On the 29th of March, 1848, the respondent Joseph Busst, being then a trader, filed, in the office of the Lord Chancellor's Secretary of Bankrupts, a declaration of insolvency, in the form of schedule D. to the 5 & 6 Vict. c. 122. On the 4th of April following, a fiat was issued against the respondent, on the petition of three creditors, and was duly forwarded to the Court of Bankruptcy for the Birmingham district.

Some of the creditors afterwards came to a resolution to give the respondent time to pay his debts, which he undertook to do in full, by four instalments; and a deed of inspection and letter of license was executed by the creditors and by the respondent, to enable the latter to carry the agreement into effect; and the fiat was, consequently, never opened.

The respondent continued to carry on business, but failed in the payment of the second of the above-mentioned instalments. The creditors then resolved to proceed in

bankruptcy; but inasmuch as the respondent had incurred debts and had traded since the fiat was issued, it was thought advisable to annul it, and issue another.

Accordingly, on the 18th of December last, the petitioner presented a petition to annul the first fiat; which was annulled accordingly.

On the same day, another docket was struck; and on the 23rd of December, 1848, a second fiat was issued, on the petition of the present petitioner, Jared Terrett Hunt.

The act of bankruptcy relied on in support of the second fiat, was the declaration of insolvency filed on the 29th of March, 1848, on which the first-mentioned fiat issued within two months; it being considered, that the issuing of this fiat, although it was afterwards annulled, was sufficient to satisfy the provision in the Act. On proceeding to open the second fiat, Mr. Commissioner *Daniell* was satisfied with all the requisites except the act of bankruptcy, but considered the declaration of insolvency not sufficient, inasmuch as the second fiat was not issued within two months after the filing of the declaration.

The prayer of the petition was, that the Commissioner might be ordered to adjudicate the respondent to be a bankrupt upon the second fiat, or that it might be ordered that the first fiat issued against him might be proceeded with, notwithstanding the same had been annulled, as mentioned in the said petition, and that the conduct of the proceedings under the same fiat might be committed to the petitioner. It was intimated to the Court, that the Commissioner was desirous of having the point decided for his guidance.

Mr. *Swanston* and Mr. *Shapter* in support of the petition.—The declaration of insolvency is a good act of bankruptcy to support the second fiat, for all that the 5 & 6 Vict. c. 122, s. 22 requires, is thus expressed: “provided a

1849.

Ex parte
HUNT,
In re
BUSER.

1849.

Ex parte
HUNT,
In re
Bussr.

fiat in bankruptcy shall issue against such trader within two months from the filing of such declaration (a).” That requisition is satisfied in the present case, as a fiat did issue within the time. [The *Vice-Chancellor*.—Is not the meaning of the clause this, that the declaration of insolvency is capable of supporting a fiat issued within two months, and is not capable of supporting one issued at a later period?]

There is an unreported decision of Lord *Cottenham*’s in our favour, upon the exactly similar words of the proviso in the 1 & 2 Vict. c. 110, s. 8, by which default in paying or securing a debt is made an act of bankruptcy, “provided a fiat in bankruptcy shall issue against such trader within two calendar months, &c.” The case is *Ex parte Parker* (b). There is a marked difference between the frame of these sections and that of the 6 Geo. 4, c. 16, s. 6, which also enacts, that a declaration of insolvency shall be an act of bankruptcy, but provides that no commission shall issue thereupon, unless it be sued out within two calendar months next after the insertion of the advertisement of the insolvency. The change in the provision must have been made designedly, and for the purpose of definitively constituting an act of bankruptcy as soon as a fiat issues, although it may not be the fiat which is ultimately prosecuted.—They also cited *Gibson v. Muskett* (c).

THE VICE-CHANCELLOR:—

Independently of authority my own opinion would probably have been different; but I consider myself bound, by the decision of the Court of Review and the Lord Chan-

(a) The corresponding provision in the new Act, 12 & 13 Vict. c. 106, s. 104, is similarly framed.

(b) C. R., 28th November and

8th December, 1839; Lord Chancellor, December 24th, 1839; reported post, p. 575.

(c) 4 Man. & Gr. 160.

cellor in the matter of *Parker*, in November and December, 1839, on the 8th section of the stat. 1 & 2 Vict. c. 110, to hold the second fiat valid.

1849.
Ex parte
HUNT,
In re
BUST.

Ex parte RICHARD PARKER,
In the Matter of RICHARD PARKER.

THIS was the petition of the bankrupt, to annul the fiat for want of an act of bankruptcy. That relied upon was the omission to pay or secure a debt according to the 1 & 2 Vict. c. 110, s. 8.

The petitioner having failed to pay or give security for the debt, a fiat issued against him within the two months mentioned in the 8th section of the Act, but was afterwards annulled for want of prosecution at the instance of a creditor.

Afterwards, and after the expiration of the two months, the fiat issued which was now in question, upon the petition of the creditor, at whose instance the former was superseded.

Mr. *Bethell*, in support of the petition (a).—First, the fiat cannot be sustained, as it is not sued out by the creditor whose alleged debt the petitioner omitted to pay.

Secondly.—It is precluded by the proviso in the clause limiting its operation to fiats sued out within two months. The annulled fiat cannot satisfy the requirement of the Act, for it is the same as if it had not existed.—He referred to 6 Geo. 4, c. 16, s. 81.

Sir JOHN CROSS said, he had no doubt upon the first point. The omission to comply with the requisitions of

(a) The report is taken from the note in the Court book of the day.

1839.
C. R.
Nov. 28th &
Dec. 6th.
L. C.
Dec. 24th.

A fiat was sued out, founded on an omission to pay or secure a debt according to the 1 & 2 Vict. c. 110, s. 8, which enacts, that such omission shall constitute an act of bankruptcy, provided a fiat shall issue within two months after the default. The fiat was not sued out by the creditor who made the affidavit of debt, and was afterwards annulled for want of prosecution. A second fiat then issued after the expiration of the two months: Held, that the failure to pay, &c., constituted a sufficient act of bankruptcy to support the second fiat.

1839.

Es parte
PARKER,
In re
PARKER.

the section was an overt act of insolvency; and the section was intended to apply to all the creditors. His Honor only required to hear the respondent's counsel on the second point.

Mr. *Swanston* for the respondent, the petitioning creditor.—It is a mistake to say, that the first fiat can be treated as a nullity. It was a valid fiat, and might be put in operation by an order in the nature of a writ of *procedendo*. Had it been otherwise, I would not argue the point.

Mr. *Bethell*, in reply.—There is no act of bankruptcy except under the Act. But the Act requires a fiat to be issued within two months. Can it be said that this requirement is satisfied by the issuing of the first fiat which has been annulled?

Sir JOHN CROSS.—The case is new, and not without difficulty. It requires much consideration. Perhaps the Court would not have annulled the first fiat, had the circumstances been brought under its notice.

Dec. 6th. On this day Sir *John Cross* gave judgment, dismissing the petition, and saying that Sir *George Rose* concurred in the decision.

Dec. 24th. On this day the matter was heard before the Lord Chancellor (Lord *Cottenham*), by way of appeal, on the following

SPECIAL CASE.

The Court hath found as follows:—That the petitioner, on the 22nd day of August now last past, was a trader within the meaning of the laws now in force respecting bankrupts, and was then indebted to one Lydia Rainsford in the sum of 100*l.* and upwards; and that the said Lydia

Rainsford did, on that day, file an affidavit in her Majesty's Court of Bankruptcy, that the said debt, amounting to the sum of 2500*l.*, was then justly due to her; and that the petitioner, as she verily believed, was then such trader as aforesaid; and the said Lydia Rainsford did afterwards, to wit, on the 26th day of August last, cause the petitioner to be served personally with a copy of the said affidavit, and with a notice in writing requiring immediate payment of the said debt.

And the Court hath further found, that the petitioner did not within twenty-one days after the said service and notice pay the said debt, nor secure or compound for the same to the satisfaction of the said Lydia Rainsford, nor did enter into any bond for securing the payment of the said debt or any part thereof, pursuant to the statute in that case made and provided, but wholly made default therein for twenty-two days then next following.

And the said Court doth further find, that, within two calendar months from and after the filing of the said affidavit, that is to say, on the 20th of September then next following, a fiat in bankruptcy was issued against the said petitioner on the petition of one Job Cox, to whom he was then justly and truly indebted in the sum of 100*l.* and upwards; and that the same was superseded for want of prosecution in due time at the instance of the said Joseph Foster, the petitioning creditor, who caused the fiat now in force to be issued in lieu thereof, on the 24th of October following, but after the expiration of two calendar months from the filing of the said affidavit.

And no other act of bankruptcy, except the default aforesaid, appears to have been committed by the said petitioner.

For the petitioner it was contended, that the law did not authorise any of his creditors, except the said Lydia Rainsford, to avail themselves of such act of bankruptcy; and that both the said fiats were, for that reason, invalid;

1839.

Ex parte
PARKER,
In re
PARKER.

1839.

Ex parte
PARKER,
In re
PARKER.

or, if not, that it was unlawful to sue out the fiat now in force after the expiration of the said two months from the filing of the affidavit.

Nevertheless, this Court, having also fully heard and considered the arguments and allegations of the counsel for the petitioner and for the said Joseph Foster, doth adjudge and determine that the said petitioner did become bankrupt within the true intent and meaning of the Act passed in the 1st and 2nd years of her Majesty's reign for abolishing arrest on mesne process, before the issuing of the said second fiat; and that the same is valid in law; and thereupon doth order that the said petition be dismissed.

Mr. *Bethell* appeared for the appellant.

Mr. *Swanston* for the respondent.

The LORD CHANCELLOR dismissed the appeal.



1849.

Feb. 8th &
12th.

Ex parte ROBERT BURTON and Others,

In the Matter of RICHARD FORD, a Bankrupt;

AND

In the Matter of GEORGE HARVEY, a Bankrupt.

Where a petition, and the affidavits in support of it, had been wrongly intitled, and the petition had been amended under an order, the Court allowed the affidavits to be taken off the file to be amended.

MR. *BACON* and Mr. *Rogers*, on behalf of the petitioner, moved that the affidavits in support of the petition might be taken off the file, in order that the title of them might be amended, so as to correspond with the petition which had been amended under an order of the Court; and, when so amended, was intitled in both the above bankruptcies, but was originally intitled in only one of them.

The VICE-CHANCELLOR, after consulting the Registrar,

Mr. Vizard, said, he was informed that there were precedents (a) in the office of such an order, to which he saw no objection.

The affidavits were ordered to be taken off the file to be amended and resworn, the solicitor undertaking to restore them so amended within a week to the proper officer of the Court.

(a) *Re Coates*, 10th August, 1848; *Re Seddon*, 14th January, 1846, and 18th February, 1846.

1849.
Ex parte
 BURTON,
In re
 FORD;
 AND
In re
 HARVEY.

Ex parte JOHN WARD,

March 7th.

In the Matter of JOHN WARD, against whom &c.

THIS was a petition to annul, for want of prosecution, a fiat which had issued against the petitioner.

Mr. *Russell* and Mr. *Aspland* supported the petition.

For the petitioning creditor it was objected, that the petition was one of course, and ought not to have been served.

Mr. *Russell* said, that the bankrupt was abroad, in the course of his business as the master of a vessel; and that, therefore, he could not sign the common petition, and that a special application became necessary.

The circumstance of a person against whom a fiat has issued being abroad, does not justify a special petition to annul for want of prosecution, as an *ex parte* application may be made to dispense with his signature.

The VICE-CHANCELLOR said, that a short *ex parte* application might have been made, and refused the bankrupt the costs of the present petition.

1849.

March 7th.

Ex parte SAMUEL WARD,

In the Matter of SAMUEL WARD, against whom &c.

An order annulling, with costs, a fiat issued against the petitioner, will not be extended to the costs occasioned to him by the issuing of the fiat, other than those of the proceedings under it.

IN this case an order had been made, annulling, with costs, for want of legal requisites, a fiat against the petitioner; and the only question was, whether the costs should include the costs occasioned by the issuing of the fiat.

Mr. *Russell* and Mr. *Aspland* were for the petitioner.

The VICE-CHANCELLOR said, he could not make an order in that form. The order might extend to the costs of contesting the adjudication; but for anything further the petitioner must bring his action.

March 19th.

Ex parte RALPH ADDISON,

In the Matter of CHARLES SAXON HOOPER and RALPH ADDISON, against whom &c.

A trader, on a dissolution of partnership, left at the place of business a direction that letters were to be addressed to him at a particular post-office, at a shop.

The continuing partner afterwards instructed a solicitor to call a meeting of creditors, and the solicitor notified this to the retired partner, who neither sanctioned the meeting nor attended it:—*Held*, that neither of these omissions constituted an act of bankruptcy.

THIS was the petition of one of the bankrupts to annul the fiat, for want of an act of bankruptcy. From January, 1843 to 1849, the bankrupts carried on business in partnership, as merchants, at No. 23, Lawrence Pountney-lane.

On the 24th of August, 1848, the partnership was dissolved.

Both the partners had resided at the place of business, till the 8th of December, 1848, when the petitioner quitted the house, and went to reside in Quebec-street, where he had previously hired a bed-room, in order to be near his

brother, who, with his wife and daughter, resided in that neighbourhood, and with whom he intended to reside, upon their obtaining suitable apartments. There was a memorandum in the diary at the counting-house, that any letters for the petitioner were to be addressed and forwarded to him, at Mr. Chews, Post-office, Crawford-street, Bryanstone-square. Addison's brother was well known to Mr. Chews. It appeared that on the 1st of January, 1849, the petitioner received a letter from the petitioning creditor's solicitor, dated the 29th of December, 1848, stating that the other bankrupt instructed him to call a meeting of the creditors of the firm on the 3rd of January, at 2 o'clock, at the solicitor's office.

The petitioner had not sanctioned the calling of this meeting, and he did not attend it. His solicitor however was present, and the meeting was adjourned to the 5th, in order to ascertain whether the petitioner would give up to the creditors the deed of dissolution; which he declined to do: and thereupon it was determined by the creditors that a fiat should be issued against the two. In support of the fiat, the housekeeper at the counting-house deposed, that she had no knowledge of the petitioner's residence; and that she believed he absented himself with intent to delay and defeat his creditors. Several persons, creditors, also deposed, that on applying at the counting-house they could not ascertain where the petitioner was to be found.

Mr. *Russell* and Mr. *J. T. Hamilton* in support of the petition.—The refusal to attend the meeting was no act of bankruptcy; nor can the petitioner's ceasing to reside at the place of business, after the partnership had ceased and it was no longer his place of business, be considered an absenting, so as to be an act of bankruptcy. By inserting an address in the diary he did all that it was necessary to do to enable the creditors to apply to him.

1849.

Ex parte
ADDISON,
In re
HOOPER.

Mr. Bacon, for the assignees, cited *Ex parte Beer* (a) as to the non-attendance at the meeting.

The VICE-CHANCELLOR.—There the bankrupt concurred in calling the meeting. An address at a post-office cannot be considered as affording a trader's creditors proper means of access to him.

The VICE-CHANCELLOR inquired whether the respondents desired an oral examination; and being answered in the negative, his Honor said:—Had the respondents wished to examine witnesses, I should have adjourned the case for the purpose of enabling them to do so. I am of opinion that, upon the materials before me, I am bound to say, that an act of bankruptcy has not been committed by this gentleman. The fiat must be annulled as against the petitioner; but it is not a case for costs. The materials before me include important facts which were not before the Commissioner.

Fiat annulled, without costs.

(a) 1 Mont. D. & D. 390.

1849.

Ex parte ARCHIBALD KEIGHTLEY, HENRY STUBBS, GEORGE SMITH, and JOHN SMITH,

April 2nd.

In the Matter of JOHN STOCKDALE, a Bankrupt.

THE petitioners Archibald Keightley and Henry Stubbs were transferees of a legal mortgage in fee. On the transfer, the other petitioners George and John Smith, who were entitled to the equity of redemption, covenanted to pay the mortgage debt.

Afterwards, the petitioners George and John Smith conveyed the equity of redemption to the bankrupt, who by the conveyance covenanted with George and John Smith to pay the mortgage debt and indemnify them in respect thereof.

The present petition prayed for a sale of the mortgaged hereditaments, with leave for the petitioners George and John Smith to bid; and that the proceeds of the sale might be applied in payment of the mortgage debt; and, if they should be insufficient, then that the petitioners George and John Smith, on paying the deficiency to the other petitioners, might be at liberty to prove for the amount so paid by them, and to enter a claim in the meantime.

A mortgagee cannot have the usual order where the bankrupt is not the mortgagor but a purchaser of the equity of redemption, although the vendors of the equity of redemption, with whom the bankrupt has covenanted to pay the debt, join in the petition, and pray to be at liberty, after paying the deficiency, to prove for the amount.

Mr. *Hobhouse* supported the petition.

Mr. *Bacon* and Mr. *Follett*, for the assignees, were not called upon.

The VICE-CHANCELLOR.—A. is indebted to B., and C. covenants with A. to pay A.'s debt. Can B. be considered a creditor of C.? Has there ever been a case where Lord *Rosslyn's* Order has been enforced, in which there could be no proof by the mortgagee for the deficiency?

Petition dismissed.

1849.

May 23rd.

EX parte HENRY THOMAS NEWTON,
In the Matter of HENRY THOMAS NEWTON.

An assignee, who had acted as solicitor to the fiat, was allowed to charge for his clerk's time employed in the business of the bankruptcy, as costs out of pocket, but not any profit thereupon.

THIS was the petition of the bankrupt, praying, among other things, that the accounts of Mr. Moss, the assignee, which had been audited previously to the 11th of August, 1848, might be opened; that it might be referred to the Commissioner to review them; and that, in reviewing the same, the Commissioner might be directed to disallow all items contained in the bills of costs of the assignee (who had acted as solicitor to the fiat) other than those items which were for or in respect of money paid out of pocket by him.

The assignee had been the petitioning creditor, the bankrupt being indebted to him on mortgage, and also in respect of a bill of costs.

Dividends, amounting to 10s. in the pound, had been already paid to the creditors, who, with the exception of the assignee, had agreed to accept the remaining 10s. in the pound without requiring interest, and that thereupon the fiat should be annulled.

At the original hearing the accounts were directed to be re-audited.

The case now came on upon the Commissioner's certificate; and the principal question was, whether the Commissioner ought to have allowed the assignee anything for the services of his clerks.

Mr. *Swanston* and Mr. *Tripp* for the bankrupt.—An assignee acting as solicitor to the estate can make no professional charge, except for costs out of pocket.—They cited *Fraser v. Palmer* (a).

Mr. *Bacon* and Mr. *E. Webster*, for Mr. Moss, contended,

(a) 4 Y. & C. 515; see *Re Wyche*, 11 Beav. 209.

that, in addition to the costs specifically paid out of pocket by the solicitor, he ought to be allowed a fair amount in respect of the services of his clerks in copying and otherwise, for which he had really paid in the payment of their salaries, although the sums paid in respect of the business of the estate could not, from the nature of the case, be distinguished.

1849.
Ex parte
NEWTON,
In re
NEWTON.

Mr. *Swanston*, in reply, said, that no such exception from the rule had ever been allowed.

The VICE-CHANCELLOR.—Documents are sometimes copied by attornies in their own offices, and sometimes they are sent to law stationers. You say, that, if an attorney in the situation of Mr. Moss sends a document to be copied or written by a law stationer, and pays him for it, it is to be allowed; but that, if, instead of sending it to the law stationer, the clerk whom he has engaged at a salary is employed for a whole day or a whole week in doing the same work, then it is not to be allowed.

Mr. *Swanston*.—If it is to be the usual professional charge, that includes a profit, which in this case he cannot make; and he has no means of severing that charge, one part of which consists of expenditure, and the other part of profit.

The VICE-CHANCELLOR.—I consider the inference to be just and unavoidable, that a paid clerk or paid clerks of this solicitor has or have been employed for the purposes of the estate, and to that extent labour and skill, for which the solicitor has paid, have been employed for the benefit of others.

I am of opinion, that an order ought not to be made against the solicitor for refunding that which he has received or which has been allowed to him, without making

1849.
Es parte
NEWTON,
In vs
NEWTON.

an allowance as nearly approaching to what is fit and correct (without including any profit) as possible, in respect of the labour so taken from him for the benefit of others. An attempt must be made to ascertain it. At present, as I understand, nothing has been allowed him in that respect. And I think it very likely, that, if I had been in the place of the Commissioner, I should have thought that I could not under this reference do it, but should have left it to another jurisdiction. It is scarcely possible that it can be done with exactness, but as near an approach as possible must be made.

Perhaps the parties can agree on a sum; if not, I must send the matter back to the Commissioner for an inquiry, the language of which will require some consideration.

Mr. *Bacon* said the amount was not an object with Mr. Moss, who would be satisfied with 50*l*.

Mr. *Swanston* said, that the petitioner would agree to 40*l*.

Mr. *Bacon* said, that, for the reason he had already stated, he would accept the offer.

The order declared, that, under the circumstances of the case, it was fit and proper that 40*l*., part of a sum of 113*l*. in the certificate mentioned, but that no other part thereof, should be allowed to Mr. Moss; and directed, that the petitioner should pay to Mr. Moss his costs of the petition, not exceeding 30*l*. The official assignee's costs in full.

L. C. 6 D. M. H. 797.

1849.

June 6th.

Ex parte ANTHONY GEORGE WRIGHT BIDDULPH,
In the Matter of ANTHONY GEORGE WRIGHT BIDDULPH, JOHN
WRIGHT, HENRY ROBINSON, and EDMUND WILLIAM JER-
NINGHAM, Bankrupts;

AND

**Ex parte THOMAS BARNEWALL and Others, in the same
Matter.**

THESE were two petitions, the latter of which was that of the assignees, seeking to expunge or reduce a proof which had been admitted for 7000*l*. The bankrupts were Messrs. Wright & Co., bankers, Henrietta-street, Covent-garden. One of the partners, Mr. John Wright, was interested under the will of a Mr. Anthony Wright. The amount proved was part of a sum standing to the account of the trustees of the will, and had been withdrawn by Mr. John Wright, and subsequently invested upon a mortgage or charge upon the Stort Navigation and Hertford Union Canal, belonging to the trustees of Sir George Duckett, not authorised by the trusts of Mr. Anthony Wright's will. A former petition (a) had been presented by the executors of the surviving trustee of the will, for sale of the security, and leave to prove for the difference. Afterwards a petition was presented by the cestuis que trustent, for liberty to prove; and under an order made upon that petition the proof now in question had been admitted, after an investigation and examination of witnesses before the Commissioner with reference to the question whether Mr. John Wright had the authority of Mr. Plowden, the surviving trustee of the will, for withdrawing the fund; it having been alleged that Mr. John Wright had, without any objection from the surviving trustee, exercised the en-

A partner in a bank drew out part of a balance standing to the account of trustees of a will, under which he was interested, without the authority of the trustees, and invested it upon a canal mortgage, which was an unauthorised security:—*Held*, on the bankruptcy of the bankers, that the cestuis que trustent were entitled to prove for the whole of the balance, without giving up the canal mortgage.

(a) See *Ex parte Burton*, 3 Mont. D. & D. 364, where the facts are fully stated.

Ex pte Wright = 367 (L. 100)

1849.
Ex parte
 BIDDULPH,
In re
 BIDDULPH;
 AND
Ex parte
 BARNEWALL.

tire control of the trust funds and of the account of the trust estate with the banking firm. It was now contended that the evidence before the Commissioner proved Mr. John Wright to have been the agent of the surviving trustee in withdrawing the fund; and that therefore the payment to him was a payment to the trust estate, and discharged the firm. It was further contended, that the petitioners could not take the benefit of Sir George Duckett's mortgage without affirming the transaction; and that at any rate the proof could not stand for the full amount, but only for so much as the proceeds of the security were insufficient to satisfy.

Mr. *Swanston* and Mr. *Amphlett* in support of the latter petition.

Mr. *C. P. Cooper*, Mr. *Bacon*, Mr. *Renshaw*, Mr. *J. A. Cooke*, and Mr. *F. Riddell* appeared for the several respondents, but were not called upon.

THE VICE-CHANCELLOR:—

Mr. John Wright has been examined as a witness; Mr. Anthony Wright was alive, and has been, or might have been, a witness. Both were partners at the time of the transaction. In that state of circumstances, it would, in my opinion, be a most unjust and improper estimation of the evidence, to say that it proves an authority, directly or circumstantially, previous or subsequent to the transaction, upon the part of Mr. Plowden, to pay the sum of 7,000*l.* in question either to Mr. John Wright or to his order, or in such manner as Mr. John Wright should direct. The consequence is, that the joint estate has not, in my opinion, discharged itself of its original liability to answer the 7,000*l.* The proof, therefore, must stand, subject to the question as to Sir George Duckett's mortgage.

It so happened, that when the 7,000*l.* was withdrawn

from the bank of Wright & Co., Mr. John Wright invested it upon a mortgage. No doubt that was done with fair and honest intentions. Now, it is said that neither those who represent Mr. Plowden, nor the persons beneficially interested in the capital of Mr. Anthony Wright's estate, can claim the proof without rejecting the mortgage, or claim any benefit from the mortgage without relinquishing the proof. That is not my opinion. The liability of the banking-house arose the instant the money was removed from the banking-house without Mr. Plowden's authority. That liability has never been satisfied, and has never been displaced. The money thus removed, in whatsoever custody it was, still remained part of the estate of Mr. Anthony Wright; and those who were interested in that estate had a right to pursue it, and to make the most they could of it, without relinquishing the liability of the original debtors.

Then comes the question whether such benefit as was derivable from the security ought to go in diminution of the proof. The security was no part of the estate of the bankrupt; it was a collateral benefit, and which ought not to go in diminution of the dividend. The proof for the 7,000*l.*, therefore, was well admitted, and due provision must be made for making Sir George Duckett's security available, and giving the benefit of it to the original testator's estate, so far as necessary to make up the 7,000*l.*, and beyond that to the joint estate from which the 7,000*l.* was taken. The petition must be dismissed, so far as it seeks to expunge or reduce the proof. The dividends upon the proof must be brought into Court, and accumulated until further order.

The order was made accordingly, and extended to several other matters, being made on both petitions.

1849.
Es parte
 BIDDULPH,
In re
 BIDDULPH;
 AND
Es parte
 BARNEWALL.

1849.

July 7th.

Ex parte JOHN BROWN,

In the Matter of CUTHBERT SMITH FENWICK, a Bankrupt.

The amount of a call made up on a contributory under the Joint-Stock Companies Winding-up Act, 1848, before his bankruptcy, may be proved against his separate estate by the official manager, although all the debts of the Company are not paid, for which the contributory is liable.

Where the direction of the Master had not been obtained before a proof was tendered by the official manager under a bankruptcy, but no objection was made on this ground to the admission of the proof before the Commissioner, and the Court, on appeal, was satisfied that the proceeding was not disapproved of by the Master — *Held*, that it was not competent to the assignees to object, on appeal from the Commissioner's decision, that the Master's approbation had not been obtained before the proof was tendered.

THIS was the petition of a creditor seeking to expunge a proof made for a call under the Joint Stock Companies Winding-up Act, the assignees having declined to appeal from the admission of the proof.

The fiat issued on the 24th of January, 1849, on the bankrupt's own petition, directed to the Newcastle-upon-Tyne District Court of Bankruptcy.

Prior to and up to the time of his bankruptcy, the bankrupt was a shareholder in the North of England Joint Stock Banking Company, which was then in course of winding-up, under the Joint Stock Companies Winding-up Act, 1848, and his name had at that time been placed on the list of contributories of the Company. At the meeting held for the choice of assignees, on the 15th of February, 1849, a debt of 11,739*l.* 11*s.* 3*d.* was proved against the joint estate of the bankrupt, by the manager of the Central Bank of Scotland, on a judgment recovered against the North of England Joint Stock Banking Company; and, by virtue of this proof, the Central Bank of Scotland voted in and carried the choice of assignees. At the same meeting, the official managers of the North of England Joint Stock Banking Company applied to prove for the sum of 4918*l.* 9*s.* 11*d.*, the amount of the balance due in respect of the call in question. The affidavit of the official managers, in support of the proof, stated, that the bankrupt was a shareholder of and partner in the North of England Joint Stock Banking Company, at and before the date of the stoppage of the Company down to the date of the fiat, and during all that time held 200 shares therein; and that the Company, on the 8th of March, 1847, stopped payment, and had not since incurred any new debts or liabilities, except what was necessary and requisite for the purpose of winding-up the concerns; and that the Company

Chapple's Case 5 Selg. & L. 400. Ex pte Nicholas 2 J. M. & G. 274.

was in the course of winding-up its concerns at the date and issuing of the fiat. The affidavit then stated the winding-up order and the proceedings under it; and that, after debiting the said C. S. Fenwick with the amount of the call, there was a balance due from him of 4918*l.* 9*s.* 11*d.*, which had not yet been paid by him; and that the Master had made the following balance-order under the Act:—

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“29th December, 1848.

“In the Matter of the Joint Stock Companies Winding-up Act, 1848, and of the North of England Joint Stock Banking Company, I, James W. Farrer, the Master of the High Court of Chancery charged with the winding-up of this Company, do order that C. S. Fenwick do, within one month from the date hereof, or within four days after the service hereof, at the banking-house of the North of England Joint Stock Banking Company, pay to the official managers of this Company the sum of 4918*l.* 9*s.* 11*d.*, such sum being the balance now appearing due from C. S. Fenwick on his account with the said Company.

“J. W. FARRER.”

The deponents further stated, that they caused a copy of such balance-order to be personally served on C. S. Fenwick, on the 4th of January last; but that no part of the sum of 4918*l.* 9*s.* 11*d.* had been paid or satisfied by him, but that the same remained due and owing to the deponents as such official managers; nor had they received any security or satisfaction whatsoever.

The Commissioner (Mr. *Ellison*) admitted the proof, giving the following judgment:—

“An order of a Court of Equity for payment of a sum of money is a proveable debt: *Wall v. Atkinson* (a). The

(a) 2 Rose, 196.

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Lord Chancellor, in his judgment, says, 'An order of this Court for payment of money has been held to be a debt proveable in bankruptcy, and, as a debt proveable, will be barred by the certificate.' In the case of *M^r Williams (a)*, a bankrupt, the bankrupt, pending his examination and as he was returning from it, was arrested by virtue of an attachment issued by the Court of Chancery in Ireland for a contempt in not lodging money in Court pursuant to a decree. The Lord Chancellor said, 'This is a process issued to compel payment of a sum of money due by this man in some shape or other as a debt; to whom due is not material.' In *Ex parte Lawden (b)*, a party entitled to a legacy under a will filed a bill in Chancery against the executor for an account and for payment of his legacy, and obtained an interlocutory order for the payment of a certain sum into Court, after which the executor became bankrupt. The Court refused an order for the legatee to prove for the specific sum mentioned in the order of the Court of Chancery, but gave him leave to go before the Commissioners, and prove for such a sum as might be due to him. The Court said, that it was impossible for the Court to say, on the mere production of the interlocutory order of the Court of Chancery, that the sum mentioned in such order amounted to a conclusive debt; and the application was made before the choice of assignees. By sect. 79 of the Winding-up Act, the list of the contributions is conclusive when settled, unless cause be shewn by the person objecting, to the satisfaction of the Master; and by sect. 99 it is declared, that, except on special leave of the Court, no appeal shall lie against any proceeding of or before the Master relating to the winding-up of the affairs of the Company, after the expiration of fourteen days after the order complained of shall have been made, or

(a) 1 Sch. & Lef. 169.

(b) 1 Mont. D. & D. 583.

after service of the same, in case the party complaining shall not have been present. Mr. Fenwick did not make any objection to the list of contributories as settled by the Master, nor did he appeal against the order of the Master."

[The learned Commissioner referred to the 83rd and 84th sections of the Act, and the proceedings before the Master, and stated and read the several orders made by him.]

"The effect of these several orders which have been made by the Master under the Winding-up Act, so far as the same in any way relate to Mr. Fenwick, is this, viz., that, before the bankruptcy, the High Court of Chancery declared that Mr. Fenwick was liable in law or in equity to pay the sum of 4918*l.* 9*s.* 11*d.* to the official manager of the Company, such sum being the balance appearing due from Fenwick on his account with the Company; and that an order, called the balance-order, having been made by the Master on the 29th of December, 1848, by which Fenwick was ordered, within one month from the 29th of December, 1848, or within four days after the service of the order, to pay to the official manager the sum of 4918*l.* 9*s.* 11*d.*; and a copy of such last-mentioned order having been served on the bankrupt personally, on the 4th of January last, that it was the duty of Fenwick to pay this sum to the official manager on the 9th January last; the bankrupt, however, did not obey the order, or pay any part of the money comprised in the order; and at the time when he signed and filed a declaration of insolvency, the act of bankruptcy on which the fiat is founded, the whole of the said sum of 4918*l.* 9*s.* 11*d.* was due from him to the official manager: such was the position of the bankrupt, and such were the obligations upon him as a member of the North of England Joint Stock Banking Company, at the time he became a bankrupt. The cases to which I have already referred, for the purpose of shewing, amongst other things, that an order of a Court of equity for payment of a sum

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of money creates a proveable debt, seem to me to establish that this sum of 4918*l.* 9*s.* 11*d.*, which Fenwick was ordered by the Master to pay before his bankruptcy, is a debt proveable by the official manager against the estate of Fenwick. Admitting that the obligation upon Fenwick to pay this money was not a legal but an equitable one only, the sum of money is proveable as an equitable debt, inasmuch as the debt existed before and at the time of the bankruptcy; the amount of the debt had then been ascertained, and it has a lawful consideration, being a demand founded (if not upon contract) upon the equitable doctrine of contribution. In the case of *Ex parte Young* (a) it was decided, that a partner, though not a surety strictly, is a person liable within the provisions of the bankruptcy law relating to sureties: and in *Ex parte Watson, Re Sheath* (b) it was decided, that a solvent partner winding up the partnership concerns is entitled to prove under the commission against the bankrupt partners the share of the loss or deficiency which each partner ought to have borne, as a debt against his separate estate." [The Commissioner referred to the case of *Wallis v. Swinburn* (c).] "It is true that a joint stock banking company established under the 7 Geo. 4, c. 46, and other Acts, with power to sue in the name of a public officer, is not to be considered as an ordinary copartnership, but a corporate body; and such joint-stock company is not affected by that which may be known to any individual shareholder; the public officer who represents a fluctuating body sues for the existing body of shareholders, and such existing body of shareholders may be different persons from those who were so at the time when the cause of action accrued: *Powles v. Page* (d), *Steward v. Dunn* (e). Now, though it is quite true that accord-

(a) 3 V. & B. 31.

(b) 4 Madd. 477.

(c) 1 Exch. 203.

(d) 3 C. B. 16.

(e) 12 M. & W. 655.

ing to these cases and others a joint-stock banking company is not an ordinary partnership, I am of opinion, and it seems to me to be clear, that if the affairs of this Company had been wound up before the bankruptcy of Fenwick by the Company themselves, and upon a final settlement of the accounts the amount of the loss incurred had been ascertained, and the amount to be provided for by Fenwick, and his aliquot share of that loss had also been clearly ascertained, and after the bankruptcy of Fenwick his co-shareholders had paid the full amount of the losses, including Fenwick's aliquot share, such co-shareholders would have come within the designation of persons liable for the debt of the bankrupt, within the meaning of the 52nd section, and have been entitled to prove his share of the loss under his fiat as a separate debt due from him to them. But, in this case, have the amount of partnership loss and the aliquot share of the bankrupt partner been ascertained before the bankruptcy? After referring to the proceedings before the Master, I am not prepared to say that this sum of 4918*l.* 9*s.* 11*d.*, is to be considered as the bankrupt's ascertained aliquot share of the loss sustained by the bank, which he ought at the time of the bankruptcy to have provided. If this sum of 4918*l.* 9*s.* 11*d.*, is such ascertained aliquot share, then, in that case, the effect of the Winding-up Act is nothing more than this, viz. to render this sum proveable against the separate estate before all the partnership debts are paid, whereas, if such Act had not passed, the sum would have been proveable against the separate estate, but not until after the payment of all the partnership debts. It is obvious, that it makes no difference to Fenwick's separate creditors, whether such proof is made before or after the payment of the partnership debts. If the actual amount of deficiency of the Company has not been ascertained, and if it must remain doubtful until the affairs of the bank shall have been

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finally wound up and settled, and the respective claims of the contributories upon each other and upon the Company shall have been adjusted and settled, whether the whole of the said sum of 4918*l.* 9*s.* 11*d.* was equitably due from Fenwick at the time of his bankruptcy, I am of opinion that the whole of that sum is, nevertheless, now proveable against his separate estate, under and by virtue of the provisions of the Winding-up Act, and upon the grounds which I have already stated, independently of the doctrine of partnership and co-suretyship. I have only to add, that I have given this subject much consideration; and that, for the reasons I have stated, I shall allow this sum of 4918*l.* 9*s.* 11*d.* to be proved by the official managers of the North of England Joint Stock Banking Company against the separate estate of the bankrupt."

Mr. *Swanston*, Mr. *F. S. Williams*, and Mr. *Brooksbank* for the petition.—The deposition on which the proof was received does not state, that the bankrupt is indebted in the amount sought to be proved; and the proof is bad, for three reasons:—

1st. That the direction of the Master to make the proof was not obtained.

2nd. That the official managers, who represent the bankrupt's partners, cannot prove against his estate in competition with the creditors of the concern, or while any of those creditors remain unpaid.

3rd. That the call is not for a sum found to be due upon a final settlement, but may be to an amount much greater than upon such settlement the bankrupt will be liable to pay.

The only provision under which the proof could be tendered is, a qualifying provision at the end of the 88th section of the Winding-up Act of 1848. That section, after authorising the official manager, with the Master's sanc-

tion, to abandon or compound for any claim against a contributory, provides, that nothing therein contained shall discharge the estate of the contributory from the demand, but that it shall be lawful for the official manager to prove for the amount thereof, and receive dividends thereon. Now, it is clear that this provision was intended to save and not to create rights. Many cases may be conceived in which a Company might be entitled to prove against a contributory; and all the provision was intended for was, to prevent any question as to such rights being interfered with by the preceding part of the clause.—They commented on the authorities referred to by the Commissioner in his judgment, and cited *Ex parte Carter* (a).

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The VICE-CHANCELLOR:—

If the new statute had not passed, but all other things had been as they are, I suppose it to be plain enough that such a proof as that in question could not have been sustained in any manner or form. The question is, whether the statute, whatever anomalies may possibly arise, has not made a difference. I think that it very plainly has; and that the sum proved was proveable, subject to the observations which I am about to make. I have alluded to anomalies: the nature of one of them is sufficiently exhibited by the existence, upon the proceedings, of the name of the Central Bank of Scotland for a debt due from the Company. It is an inevitable difficulty; and when it comes into practical operation, the Court must deal with it as it can. Whatever may be the consequence, the Act of Parliament must be pursued and obeyed; which I think would not be the case if this demand were held not to be proveable. I collect, that the point as to the leave of the Master not having been obtained before the proof was tendered, was not raised before the Commissioner; and I apprehend that I ought to consider the objection as waived, subject to this

(a) 2 G. & J. 233.

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one remark, that I shall think it expedient to be informed now whether the Master approves of the proof (a).

A witness was examined *vivâ voce*, and stated, that the proceeding had been brought under the Master's notice, and that he had expressed no disapproval of it.

The VICE-CHANCELLOR said, that this was satisfactory; although probably the assignees could not be heard to object, on the ground of the want of approval.

(a) In order to obviate some of the anomalies alluded to in the above judgment, the following section was introduced into the Joint Stock Companies Winding-up Amendment Act of 1849, s. 30: "And be it enacted, that where any contributory of the Company is a bankrupt or insolvent, it shall be lawful for the official manager to prove, in the matter of such bankruptcy or insolvency, for any balance ordered by the Master to be proved against the estate of such contributory, and to take and receive dividends in respect of such balance in the matter of the bankruptcy or insolvency as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors: Provided always, that if any creditors of the Company, not being such petitioning creditor under the fiat as after mentioned, shall have proved or shall prove against the estate of such bankrupt or insolvent contributory in respect of any debt due from the Company, then the dividends received by the official

manager from the estate of such bankrupt or insolvent contributory shall be paid and distributed by the official manager, under the direction of the Master, in the first instance, rateably amongst the creditors of the Company so proving against the estate of such bankrupt or insolvent contributory as aforesaid, until the debts due to such creditors respectively be fully paid, and, subject thereto, such dividends shall be applied by the official managers towards the general purposes of the winding-up of the affairs of the Company: Provided also, that in case any such fiat shall have been issued on the petition of a joint creditor of the said Company in respect of his joint debt, and he shall have proved such joint debt for the purpose of receiving dividends under such fiat, then any dividends paid to such petitioning creditor under such proof shall be set against the dividends payable to such official manager in respect of the proof so made by him as aforesaid, so far as the same will extend."

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Ex parte Moss,

In the Matter of DAVIES, a Bankrupt.

July 9th.

THE bankrupts, being shareholders in a public Company, deposited their shares with the petitioners, who were bankers, as a security for sums advanced by them for the purchase of the shares; but no written memorandum of deposit was made.

Equitable mortgagee by deposit of shares in a public Company without written memorandum, held entitled to his costs, on evidence of custom not to give written memorandum.

The mortgagees now presented their petition for a sale of the shares. An affidavit was filed in support of the petition, deposing that it was not the custom, in course of business, on a deposit of shares under the circumstances stated in the petition, to have such a memorandum.

Mr. Bacon, in support of the petition, cited *Ex parte Sheppard* (a).

Mr. Broderick for the assignees.

The VICE-CHANCELLOR held, that the costs ought to be given as in the case of a deposit with a written memorandum.

(a) 2 Mont. D. & D. 431.

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Aug. 6th.

Ex parte ROBERT ANDERSON,

In the Matter of WILLIAM ASH, a Bankrupt.

A loan was made on a deposit of agreements for building leases, with a written memorandum; afterwards the leases were obtained and deposited in lieu of the agreements, but without any fresh memorandum:—*Held*, that, on the usual petition of the equitable mortgagee in bankruptcy, the order ought to be made as in cases of no written memorandum.

MR. HARE appeared in support of the usual petition of an equitable mortgagee, and the only question was as to the costs. The advance had been made on July 1st, 1848, upon the deposit of two agreements for building leases, with a written memorandum, signed by the bankrupt, stating that the bankrupt had deposited the two agreements with the petitioner, and admitting and declaring that the deposit was made to secure the amount advanced, with interest at 5*l.* per cent., and any further sums which might be advanced, together with interest thereon at the like rate. Leases were afterwards granted to the bankrupt, in pursuance of the agreements, and were deposited with the petitioner in lieu of the agreements, but no new memorandum was given.

Mr. Baggallay for the assignees.

The VICE-CHANCELLOR held, that the order must be made as in cases where there is no written memorandum.

1849.

Ex parte NORTHCOOTE WILLIAM SPICER and CHARLOTTE
JAMES,

Nov. 7th.

In the Matter of GEORGE MATHIAS, a Bankrupt.

THIS was the petition of creditors, praying that the bankrupt's certificate might not be confirmed, but might be recalled and cancelled, or suspended.

According to the statements of the petition, and the affidavits in support of it, the bankrupt carried on business as a solicitor, at Glastonbury, originally in partnership with a Mr. James, and upon his decease, which occurred in November, 1845, alone. He was employed by the petitioners, who were the executor and executrix of his late partner, in the business of the executorship. They had signed an authority empowering the bankrupt to receive a sum of 1500*l.* payable to their testator's estate on a policy of assurance in the Provident Life Office, directing him to deposit it, when received, at a particular bankers', in the names of the petitioners, as executors of the late Mr. James. It was further stated, that, instead of so paying the amount, the bankrupt paid it to his own credit at the bankers', to whom he was, as the petitioners believed, largely indebted. The account of the bankrupt's receipts and payments were afterwards taken, and a balance of 1159*l.* was admitted by him to be due from him to the estate.

On the 15th of February, 1848, the petitioners commenced an action against him for that amount. The petition alleged that the bankrupt defended the action vexatiously, and pleaded a set-off of 700*l.* On the 18th of March, 1841, he filed a bill in Chancery, seeking to establish a partnership between himself and the petitioners as executors, and praying for an injunction to restrain proceedings in the action. Judgment was obtained against him in the action.

An attorney employed to receive money and pay it to the client's account, paid it to his own; and, on the client bringing an action, vexatiously defended it, and filed a bill (which was dismissed) to restrain execution. He was afterwards found bankrupt as a scrivener:

—*Held*, that the conduct of the bankrupt was not conduct as a scrivener, so as to be capable of being regarded in reference to the allowance of his certificate.

Ex pte Slater 2 D. M. V. 263.

Ex pte Milborne 2 D. F. V. 622.

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The bill was afterwards dismissed.

On the 18th of April, 1848, the fiat was issued, the trading found being that of a scrivener.

The bankrupt passed his last examination on the 14th of November, 1848; and on his application for his certificate on the 14th of May, 1849, Mr. Commissioner *Stephen* gave judgment as follows:—

“The bankrupt in this case had carried on business as an attorney, solicitor, and conveyancer, and also as a scrivener; but it is in the latter capacity only that he became or could legally become the subject of a fiat. On the application for his certificate, he was opposed by a Mr. Spicer, one of the executors of a Mr. James, with whom the bankrupt had formerly been in partnership in the business of attorney, solicitor, and conveyancer; and the opposition was founded on the bankrupt's alleged misconduct in respect to a large sum of money, which had been received by him after Mr. James's death, in the capacity of solicitor to Mr. James's executors, and for which he was accountable to those executors. It appeared that an indictment had been lately preferred against the bankrupt, charging him with the felonious embezzlement of this money; but that a verdict of not guilty had been returned by the jury, and that the course of the trial had been such as to lead to the inference, that such verdict must be understood as an acquittal upon the merits, and on the ground of absence of felonious intention. Under these circumstances I refused to listen to any opposition founded on the same facts, and involving the same imputation of felonious embezzlement. But Mr. Spicer's counsel then claimed a right to oppose, on the ground of the bankrupt having improperly (though not feloniously, or so as to subject him to indictment) kept the said sum of money in his own hands, and dealt with it in his own way, instead of paying it over, as he had been directed to do, to the account of the executors;

and, when called upon to refund the balance which he admitted to be due, after taking credit for certain payments which he alleged himself to have made on behalf of the executors, endeavouring to elude the demand by false representations and promises, which he never in fact performed; and, when afterwards an action was brought against him for the recovery of what was due, defending such action vexatiously, and for the mere purpose of delay, and filing, for the same purpose, a vexatious bill in the Court of Chancery. Upon such grounds as these, I thought the opposition might be allowed, notwithstanding the verdict of acquittal as to the charge of felonious embezzlement. It appeared to me, however, that even supposing such misconduct to have been committed by the bankrupt, it could not be considered as committed by him in his capacity of scrivener, in which alone he became liable to the bankrupt law; and I, consequently, doubted whether it could form a legal ground of opposition to his certificate; and I, therefore, deemed it expedient to call for an argument upon these points, before proceeding to any investigation of the matter of fact. Upon the argument which accordingly took place, it was conceded by the counsel for Mr. Spicer, that the money in question did not come to the bankrupt's hands as a scrivener, though he contended, nevertheless, that his misapplication of it, and the dilatory and vexatious means to which he resorted for evading the repayment, must be considered as misconduct committed in that capacity. I do not, however, see how these two propositions can be made compatible; and I think it clear, that no part of these transactions had reference to his capacity as scrivener; and taking this to be so, the words of the Act of Parliament, 5 & 6 Vict. c. 122, seem to exclude the consideration of it as a ground for affecting the bankrupt's certificate; for the words of the 39th section are express, that the Commissioner is to grant or refuse the certificate 'having regard to the conduct of the

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bankrupt as a trader.' Instances, indeed, may be put (as in the case of gambling and extravagant expenditure) in which misconduct, not immediately committed in the capacity of a trader, may nevertheless be considered as indirectly so committed, because it tends to diminish the funds to which the trade creditors are entitled to look for payment; but such reasoning has no application to the kind of misconduct now in question, which neither directly nor indirectly seems to affect any creditor, except Mr. Spicer, who is not a trade creditor. And though it has been agreed, that a vexatious defence to an action, or a vexatious bill in Chancery, is injurious to the whole body of creditors, as amounting to an improper and wasteful expenditure of money, I find myself unable to accede to such a view of the matter. The state of the authorities is in accordance with my decision in this case. In *Re Crossfield* and *Re Gibbs*, Mr. Commissioner *Holroyd* clearly maintained the doctrine, that where a man is both solicitor and scrivener, it is only his conduct in the latter capacity that can affect his certificate. In *Re Arbuthnot*, indeed, Mr. Commissioner *Fonblanque* expressed an opinion, that gambling by a trader ought to be considered as an offence committed in the capacity of a trader; and that is an opinion, the correctness of which appears unquestionable, but, as already observed, it is one that has no application to the present case, where neither gambling is charged, nor anything else that can be considered as a wasteful application of the bankrupt's funds, to the prejudice of his creditors in trade. As to *Re Thompson*, though the report of it seems to represent Mr. Commissioner *Fane* as having refused the bankrupt his certificate, on the ground of a cheat committed by him as a solicitor or rather as a private individual, I feel no doubt, that if the case were more fully reported, the offence would appear to be referable to his capacity of scrivener. At all events, I do not find that any question was raised before the learned Commis-

sioner as to the sufficiency of such misconduct to affect his certificate, within the meaning of the Act of Parliament; and his attention, therefore, may not have been drawn to the point. Upon the whole, the result is, that the opposition to the certificate, so far as regards the ground hitherto taken, is disallowed."

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On the 27th of September, 1849, another meeting was held, at which the certificate was granted.

From this decision the present petition was an appeal.

Mr. *Schomberg*, in support of the petition, contended, that the money was entrusted to the bankrupt in his capacity of scrivener; and that, even if, under the law antecedently to the passing of the Bankrupt Law Consolidation Act, 1849, the certificate could not have been refused, yet, that that enactment, by its 203rd section, made vexatious litigation a ground for refusing the certificate; and that, therefore, the Court could now recal the certificate.

Mr. *Flather*, for the assignees, was not called upon.

The VICE-CHANCELLOR:—

I think myself bound to deal with this petition upon the footing of the law as it stood before the Act of Parliament of the last session, considering that Mr. Serjt. *Stephen's* decision was pronounced in the month of September last, and that the Act did not come into operation until the 11th of October.

That being so, the question of law is, whether upon the facts as they appear,—the conduct in question of the bankrupt was the conduct of the bankrupt "as a trader." Now, the bankrupt was an attorney, and he was made a bankrupt as a scrivener, and the description in the Act of Parliament of a scrivener is, "Scrivener, receiving other men's

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monies or estates into his trust or custody." In the present case, a sum, in respect of which the bankrupt is alleged to have misconducted himself, was certainly the money of other men, received by the bankrupt into his trust or custody; but I think that it was not money received into his trust or custody by him as a scrivener.

I feel myself obliged to come to the same conclusion with the learned Commissioner,—that this conduct was not conduct of the bankrupt as a trader.

Of course, the advantage to one side or the other does not enter into the reasons for my decision; but, I must observe, that it has this advantage for the petitioner, that, the decision pronounced on this point being on a point of law, the petitioner will be entitled to appeal, as I understand; whereas, if I were to pronounce a decision simply on my view of the merits, in point of fact, there would, as I suppose, be no appeal. I decide on the point of law as the learned Serjeant did.

Petition dismissed, without costs.

1849.

Ex parte EDWARD LORD,

In the Matter of EDWARD LORD, against whom &c.

Nov. 7th.
Dec. 5th.

MR. T. H. TERRELL appeared in support of a petition of one of two bankrupts; against whom a joint fiat had issued, to have the fiat annulled.

The adjudication became absolute on the 27th of September, and was advertised on the 28th.

The present petition was filed on the 18th of October.

Mr. Swanston and Mr. Russell, for the respondent, objected that the petition was intitled "In the Matter of Edward Lord," and that there was no such matter, the fiat having issued against Edward Lord and William Archer, as appeared upon the petition itself.—They also submitted, that the petition must, on this account, be absolutely dismissed, the time for presenting a petition in a correct form having expired.

A petition of one of the bankrupts to annul the fiat was wrongly intitled:—*Held*, that the Court might, after the expiration of twenty-one days from the insertion of the advertisement, permit the title to be amended, and the petition to be served on the other bankrupt, and that these steps did not render the amended petition a new proceeding, so as to be precluded by the lapse of the twenty-one days.

The VICE-CHANCELLOR referred to *Ex parte Veysey* (a), and said, that the view taken by Lord Lyndhurst in *Ex parte Thorold* (b), did not, in his Honor's opinion, preclude the Court from allowing a mere slip in the title of a petition to be corrected.

The petition stood over with leave to amend.

Mr. Bacon and Mr. T. H. Terrell again brought on the petition.

Dec. 5th.

Mr. Swanston and Mr. Russell objected to the petitioner proceeding, and contended, that an amended petition was,

(a) 3 Mont. D. & D. 420.

(b) 3 Mont. D. & D. 285.

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in fact, a new one, requiring to be re-served; and that, as the affidavits were wrongly intitled, they would require to be resworn. They argued, that a petition could not be considered as a proceeding until it was served on some one at least. That, in *Ex parte Veysey* (a), it had been served on the petitioning creditor, and yet the Court thought that leave could not be given to amend it.—They further objected, that the other bankrupt had not, even now, been served.

THE VICE-CHANCELLOR:—

I should certainly proceed to hear this petition if the other bankrupt had been served; but as he has not, I shall allow the petition to stand over, with liberty to serve him.

It was then arranged between the parties that the petition should be dismissed without costs, the petitioner undertaking not to bring any action against the assignees.

(a) 3 Mont. D. & D. 420.

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Ex parte WILLIAM SHEWARD,
In the Matter of WILLIAM SHEWARD, and of THE
BANKRUPT LAW CONSOLIDATION ACT.

Nov. 16th &
21st.

THIS was a motion, by way of appeal, to discharge or vary an order made by Mr. Commissioner *Goulburn*.

The respondent, Mrs. Elizabeth Folker, claimed to be a creditor, for 1284*l*., of the appellant, and summoned him before the Court of Bankruptcy, under the 78th section of the Bankrupt Law Consolidation Act (1849), upon an affidavit of debt made under the provisions of that section.

The appellant appeared, and made an affidavit, according to the provisions of the 79th section of the same Act (a), that he believed he had a good defence to the demand on the merits, as required by the Act.

He also tendered himself to be examined by the Commissioner; but the respondent's counsel objected to his being examined, and contended that he must enter into a bond.

(a) Sect. 79. "That upon the appearance of any such trader so summoned as aforesaid, it shall be lawful for the Court to require him to state whether or not he admits the demand of the creditor, or any and what part thereof; and, if such trader shall admit such demand or any part thereof, to reduce such admission into writing in the form contained in schedule (I.) annexed to this Act; and such admission so reduced into writing, such trader is hereby required to sign, and, being so signed, the same shall thereupon be filed in such Court; and it shall also be lawful for the Court to allow such trader, upon his said appearance, to make a deposition upon oath, in writing under his hand, to be filed in such

Court in the form contained in schedule (J.) annexed to this Act, that he verily believes he has a good defence upon the merits to such demand, or to some and what part thereof; and in such case it shall be lawful for the Court at the same time to require such trader to enter into a bond, according to the form contained in schedule (K.) to this Act annexed, in such sum and with such two sufficient sureties as the Court shall approve of, to pay such sum or sums as shall be recovered together with such costs as shall be given in any action which shall have been or shall be brought for the recovery of such demand, or of any part thereof, in respect of which such deposition shall be made."

Seem, that the 79th section of the Bankrupt Law Consolidation Act, 1849, does not render it imperative upon the Commissioners to require a trader, summoned under that section, to enter into a bond.

Upon such a summons, if either the trader or the creditor tenders himself to be examined, his examination ought to be taken. But it is not incumbent on the Court to hear any other witnesses.

1849.

En parte
SHEWARD,
In re
SHEWARD.

The Commissioner declined examining him, and made the order now in question, which was dated the 10th of November, 1849, requiring the appellant to enter into a bond according to the form set out in schedule K. to the Bankrupt Law Consolidation Act (1849), in the sum of 1500*l.*, with such two sufficient sureties as the Commissioner might approve of, to pay such sum or sums of money as should be recovered, together with such sum or sums of money as should be given in any action which should be brought for the recovery of the demand of Elizabeth Folker.

Mr. *J. V. Prior* in support of the motion.—The statute does not make it incumbent on the Commissioner to require a bond. Under the 8th section of the 1 & 2 Vict. c. 110, a trader could not avoid committing an act of bankruptcy, if he could not instantly pay a demand, (however large or suddenly made), or unless he could persuade some one to become surety for him. It was afterwards considered, that this was too harsh a requirement; and that a man might be solvent, and able to meet all his engagements, if proper time were given to him, who might yet, at any particular moment, not have the means of instantly providing for them all, or of inducing any one to become a surety for their payment. The 5 & 6 Vict. c. 122, s. 12, was consequently substituted for the former enactment, and only required an affidavit of the trader, that he believed that he had a good defence to the demand upon the merits. This again seemed in some cases not sufficiently to protect the creditors, and therefore the present Act was so framed, as to leave it to the discretion of the Commissioner in each case, whether a bond should be required or not. In this case, the Commissioner declined to exercise any discretion, or to examine the appellant or any witness, considering it imperative upon him to require a bond. That this was an erroneous view of the Act, seems clear from other sections of it. Thus the 80th section provides, that if the trader, when so summoned, shall not make a deposition that he

has a good defence, and (if required by the Court so to do) enter into a bond, he shall be deemed to have committed an act of bankruptcy. And the 82nd section has the same parenthesis, which can only be explained by supposing the Commissioner to have a discretionary power to require a bond or not.

1849.
Ex parte
 SHEWARD,
In re
 SHEWARD.

The VICE-CHANCELLOR suggested, that the parenthesis might have been intended to meet the case which occurred in *Ex parte Stamp (a)*, of a trader being incompetent to act.

Mr. *Goodeve* for the respondent.—Or the qualification may have been intended to provide against an irregularity in the summons, or a demand upon the face of it invalid; in any of which cases a bond would not be called for. But for the qualification it might have been considered, that, even in such cases, it would be imperative upon the Commissioner to require a bond wherever there was an affidavit of debt, and a summons, according to the terms of the Act. And, at all events, one out of many conjectural interpretations of the parenthesis cannot be sufficient to control the express terms of the 79th section. The words which it employs, “it shall be lawful,” are the same as in many cases have been held sufficient to give the subject a right to call on a tribunal to which they are applied to exercise the jurisdiction conferred by them.

Mr. *J. V. Prior* replied.

The VICE-CHANCELLOR:—

If Mr. Sheward shall tender himself for examination before me, I will examine him; and if Mrs. Folker shall tender herself for examination, I will also hear her.

The motion stood over for the appellant and respondent to appear and be examined.

Mr. Sheward and Mrs. Folker were on this day examined *vivâ voce*.

(a) 1 De G. 345.

1849.

Ex parte
SHEWARD,
In re
SHEWARD.

Mr. *J. V. Prior*, for the appellant, tendered other witnesses to be examined.

The VICE-CHANCELLOR said he would hear the question argued, whether the appellant was entitled to call witnesses on this proceeding.

Mr. *J. V. Prior* contended, that, in deciding whether a bond was to be required or not, the Court was acting judicially, and was bound to adopt all the means which the Act gave it of ascertaining the exact state of facts, and for that purpose to examine witnesses *vivâ voce*, if the case required that course to be taken. The exaction of a bond from a trader might involve his ruin, and might therefore be as important a matter as any of those for the determination of which the legislature had conferred powers upon the Commissioners.

The VICE-CHANCELLOR:—

I consider, that, under the Act of Parliament, the Court is not bound to hear witnesses; under which term I do not include the parties to the contest. Being of opinion that I am not bound to hear witnesses, the question then is, whether I can hear them on the present occasion. That question I think it unnecessary to decide, because, if I can hear them, I am of opinion that this is a case in which I ought not to hear them. But I am ready to hear a reply on the evidence as it stands.

Mr. *J. V. Prior* in reply.

The VICE-CHANCELLOR:—

I refuse this motion. But if an enlargement of time is wished, which may be necessary before going again to the Commissioner, that may be given, and probably ought to be given.

I think that either party tendering himself or herself to be examined before the Commissioner ought to be examined.

Motion refused, without costs.

1849.

Ex parte PHILIP LYTOOTT HINDS,
In the Matter of JONATHAN HIGGINSON and RICHARD DEANE,
Bankrupts;

AND

Ex parte JAMES PICKFORD HIGGINSON,

In the same Matter.

Nov. 21st &
23rd,
Dec. 19th.
1850.
Feb. 18th.

THIS was the petition of joint creditors, praying that certain railway shares might be administered as part of the joint estate of the bankrupts, or that a proof might be admitted on behalf of the joint estate against the separate estate, for the amount of the purchase money paid for the shares. The Commissioner had rejected the proof, and, in giving judgment, stated the facts of the case, in substance, as follows:—

The bankrupts, Jonathan Higginson and Richard Deane, carried on business as merchants, at Liverpool under the firm of Barton, Irlam, & Higginson, and at Barbadoes under the firm of Higginson, Deane, & Stott; Mr. Higginson managing the business at Liverpool, and Mr. Deane at Barbadoes. Between April, 1846, and November, 1847, Mr. Higginson made large purchases of railway shares in his sole name, and apparently on his sole account. No communication was ever made by him to Mr. Deane concerning them, but the shares were charged for in the partnership accounts against Mr. Higginson individually.

Mr. Higginson had the sole management and control of the partnership business, and of its funds; and Mr. Deane did not interfere during the period of the purchases of the shares, but was at Barbadoes, attending to the partnership business there. He did not return to England until August, 1847.

Two partners traded as merchants at Liverpool and Barbadoes, one residing and transacting the business at each place. The Liverpool partner, without the authority or knowledge of the other, laid out partnership monies in the purchase of railway shares in his own name, but on account of the partnership, and in substance declared himself a trustee of the shares for the firm. Afterwards the firm became bankrupt:—*Held*, 1st, that the joint estate had no right of proof against the separate estate of the Liverpool partner for the amount laid out upon the shares; 2nd, that the shares ought to be administered as joint estate, and that the clause as to

reputed ownership did not apply.

Where a party, who upon an original hearing of a petition was represented by the respondent, petitioned for a rehearing, describing himself as resident abroad, he was required to give security for costs.

1849.

En parte
HINDS,
In re
HIGGINSON.

No authority was given by Mr. Deane to Mr. Higginson to invest any of the partnership monies in railway shares, except such authority as might be included in the general power given to him by implication to deal with the partnership funds as he thought fit.

It was stated by Mr. Higginson on his examination, that the shares in question were purchased for the joint account; but there was no entry or document having reference to any such intention.

The book-keeper of the firm on his examination stated, that, where the purposes for which any monies were paid were known, they were placed to Mr. Higginson's general account, and where they were not known, then to his private account, which the deponent understood to be the share account. That, before Mr. Deane's return to England in August, 1847, the book-keeper added the words "share account" to the words "private account" at the heading of the entries as to the monies in question drawn out by Mr. Higginson; and that, previously to this time, those monies of which the book-keeper did not know the destination, were entered in the folio then headed "Jonathan Higginson's private account" only. That the books, upon the face of them, shewed all the monies drawn out by Mr. Higginson from the concern on every account, and the balance due from his private estate to the joint concern. That Mr. Deane, after his return to England, did not examine these books, except in two instances; and that he then only looked at his own private account, and did not look over any other part of the books. That Mr. Deane called occasionally at the office where the books were kept, and where he might have examined them; but that no inquiry or observation was ever made by or to him on the subject of the shares.

On Mr. Deane's examination in December, 1847, he was asked if he had any shares in any railway in Great Britain;

to which he replied: "No, nor any interest in any." No further examination was made of Mr. Deane in reference to the shares in question, and he had returned to Barbadoes.

1849.
 {
Ex parte
 HINDS,
In re
 HIGGINSON.

Upon these facts, the Commissioner came to the conclusion, that a fraudulent abstraction was not shewn to have been made of the partnership monies in question, such as would authorise the admission of a proof on behalf of the joint against the separate estate. He considered the case as falling within the authority of *Ex parte the Assignees of Lodge and Fendal* (a), from the circumstance of Mr. Deane having left the sole control and dominion over the partnership property to Mr. Higginson; and also within the cases of *Ex parte Harris* (b) and *Ex parte Smith* (c), not only from the circumstance of this sole control and dominion, but also by reason of entries having been made in the partnership books, from which the application of the partnership monies in the shares in question could have been ascertained. He also referred to the following observation of the Vice-Chancellor in the latter case:—"If one partner be intrusted with the entire management of the partnership concern, and withdraws monies for his separate use, which he duly and openly enters in the partnership books, this is not a fraud which entitles the joint estate to prove against the separate estate; otherwise, if, by the entries in the books, he disguises the transaction, or wholly omits and conceals it." The judgment of the learned Commissioner then proceeded as follows:—"In the case of *Ex parte Yonge* (d), where the proof was allowed, no entries had been made of the bills abstracted; and, in that case, the Lord Chancellor observed, that, 'if the other partners could have known that

(a) 1 Ves. jun. 166.

(c) 1 G. & J. 74.

(b) 2 V. & B. 210.

(d) 3 V. & B. 31.

1849.
} *Ex parte*
HINDS,
In re
HIGGINSON.

their copartner had applied the copartnership property to his own purposes, from their immediate or subsequent knowledge upon their subsequent dealings, their consent would be implied.' In *Ex parte Watkins* (a), where proof was also allowed, the stock which was vested in one partner as trustee for the firm was sold out, in order to increase his separate estate, without his copartners' knowledge; and his copartners' subsequent conduct was not held to amount to acquiescence. This case may, at first sight, be considered as a strong authority for allowing the proof in the present instance, as here the purchase of the railway shares was certainly made by Mr. Higginson for the purpose of increasing his separate estate, and without his partner's express knowledge; but, in the present case, I think that, considering the opportunities which Mr. Deane had of acquiring full knowledge of the investment of the partnership monies in these shares, his omitting to do so amounted to a tacit acquiescence; so that I do not think that *Ex parte Watkins* is in point with the present. In *Ex parte Turner* (b), the Judges of the Court of Review considered that there was no fraudulent abstraction, although entries were not made of the improper appropriation until after it was discovered, the circumstances having been known to the clerk whose duty it was to keep the books; so that the other partner had the opportunity of immediate knowledge. The only distinguishing feature in the present case is, that Mr. Deane was abroad when the purchases of these shares were made; and it might be said, that therefore the entries in the books might safely be made without giving him any information on the subject. This, however, would not take the case out of the general rule established by *Lodge and Fendal* and by *Ex parte Harris* as to the sole control and

(a) 1 Mont. & M. 57.

(b) 1 Mont. & A. 54; 4 Deac. & C. 169.

dominion over the partnership funds; nor will this remark apply to the period after Mr. Deane's return to England, when the books were open to his inspection, and when, if he had exercised only ordinary diligence, he would have acquired full information on the subject; his negligence in this respect amounting, I apprehend, clearly to an implied consent. Upon these grounds, I consider that the proposed proof cannot be allowed." The Commissioner also referred to *Marsh v. Keating* (a) and *Sadler v. Lee* (b). The question as to the shares being joint estate had also been submitted to the Commissioner, who thought that he had no jurisdiction to decide it.

1849.
Es parte
HINDS,
In re
HUGGINS.

Mr. Bacon, Mr. Malins, and Mr. Baggallay, supported the petition.

Mr. Roundell Palmer appeared for the assignees.

Mr. Russell and Mr. Charles Hall for the separate creditors.

The VICE-CHANCELLOR said, that he agreed with the Commissioner as to the rejection of the proof; and his Honour reserved his judgment on the rest of the case.

The VICE-CHANCELLOR:—

I have considered attentively the examinations, affidavits, and documents forming the evidence in support of this petition and in opposition to it, including the short-hand-writer's affidavit, filed on the 28th of November, and the book or document to which it refers. That a sufficient case was not made for a proof on behalf of the joint es-

Dec. 19th.

(a) 1 Mont. & A. 592.

(b) 6 Beav. 324.

1849.

Ex parte
HINDS,
In re
HIGGINSON.

tate against Mr. Higginson's separate estate, I expressed an opinion upon a former day, an opinion which continues to appear to me well founded. I think so, whatsoever view it may be proper to take of the question of the title to the railway shares in dispute, upon which mainly, if not solely, my judgment was reserved, namely, this question, whether the railway shares ought to be treated as belonging to the joint estate or to Mr. Higginson's separate estate, which, if not a pure question of fact, is a mixed question of fact and law. And upon it I am now able to say, that the evidence (taken altogether) has satisfied me—first, that the joint estate was the estate which mediately or immediately, directly or indirectly, but which, substantially and truly, paid for the whole of the shares in controversy, namely, the shares mentioned in the balance-sheet as belonging to the joint estate; secondly, that, as a matter of positive fact, and not merely by way of inference or presumption, it is true that Mr. Higginson meant to acquire and did acquire these shares on account of the partnership, though in his own name; thirdly, that, before the bankruptcy, he in effect and substance declared himself to be a trustee, and in truth was a trustee of them for the partnership; fourthly, that, by that character of trustee, as well as by Mr. Deane's ignorance or imperfect knowledge before the bankruptcy of the circumstances of the case, and the obscurity in which the matter of the shares was until that time involved, the operation of the doctrine of reputed ownership is excluded; and fifthly, that upon these grounds the shares mentioned in the balance-sheet as joint estate were properly so mentioned, and ought to be so considered and treated. But the account of Mr. Higginson with the firm must have credit for the sums applied by Mr. Higginson in paying for them. I make an order on the petition, declaring to that effect accordingly. The costs of the petition will, as to those of the petitioner,

be paid out of the joint estate; as to those of the party or parties who opposed it out of Mr. Higginson's separate estate; and as to those of the assignees equally out of that estate and the joint estate.

1849.
Ex parte
 HINDS,
In re
 HIGGINSON.

A petition of rehearing was presented by James Pickford Higginson, a separate creditor, who was described in the petition as residing at New York, in America; and the case was on this day re-argued, the books of the firm produced, and the entries in them fully examined and discussed.

1850.
 Feb. 18th.

On the petition of rehearing coming on,

Mr. Bacon, Mr. Malins, and Mr. Baggallay, for Mr. Hinds, objected to the case proceeding until the petitioner had given security for costs, he being resident abroad.

Mr. Russell and Mr. C. Hall, for the petition of rehearing, contended that it resembled a cross bill, upon which no security for costs was ever called for; and, moreover, that the application for security came too late, and ought to have been made as a distinct motion upon notice.

The VICE-CHANCELLOR held that the application ought to be acceded to.

Security was then given, and the rehearing proceeded.

At the termination of the argument the VICE-CHANCELLOR expressed his adherence in all respects to the judgment already given.

Ex parte Turner 2 D. M. 493.

1849.

Ex parte WILLIAM BAINBRIDGE,

Nov. 21st.

In the Matter of JOHN STANTON, a Bankrupt.

Where a trader assigned all his property for the benefit of all his creditors, and, a few days afterwards, sued out a fiat against himself, under which the official assignee took possession of property comprised in the deed, the Court ordered the property to be delivered up to the trustees of the deed, without any deduction in respect of the official assignee's poundage.

ON the 3rd of April, 1849, John Stainton executed an indenture of that date, made between himself of the first part; Charles Thomas Bainbridge, William Bainbridge, and Alexander Cowan, who were his creditors, and were also trustees, named and appointed on behalf of themselves and other creditors, for the purposes therein mentioned, of the second part; and the several persons, creditors of John Stainton, who, by themselves or their respective attorneys or partners, should execute the indenture, of the third part. This deed, after reciting that John Stainton was seised of the several freehold messuages or dwelling-houses in Lincoln therein described, and also of the stock in trade, household furniture, and effects, in and upon his dwelling-house, shop, and premises; and reciting that he was justly indebted to the parties thereto of the second and third parts, in the several sums set opposite their respective names in the schedule thereunto annexed, which he was unable to pay in full, and had therefore proposed and agreed to grant and convey all his real estate, and to assign his personal estate and effects, unto the petitioner and his co-trustees, for the benefit of his creditors as therein mentioned, witnessed, that John Stainton released and confirmed unto and to the use of the trustees, their heirs, executors, administrators, and assigns, certain messuages, tenements, or dwelling-houses, shops, and yards; and also assigned and transferred unto them, their executors, administrators, and assigns, all and every his stock in trade, printing presses, and all other his personal estate and effects. And it was thereby declared, that the trustees should stand and be seised of the freehold messuages, shops, and premises, and of the personal es-

tate and effects, upon trusts therein expressed for sale, and for payment proportionally, and without preference or priority, to themselves the trustees, and their partners, and the persons parties thereto of the third part, of the several debts or sums set opposite their respective names in the schedule thereto.

On the 12th of April, 1849, Mr. Stainton sued out a fiat against himself; whereupon one of the trustees presented the present petition, stating that John Stainton procured the fiat to be issued, for the purpose of defeating the trust deed, and against the wish of all his creditors, excepting one Joseph Islip; and that the petitioner and his co-trustees, and all the creditors excepting Joseph Islip, were desirous that the fiat should be annulled. The petition also alleged, that, previously to the issuing of the fiat, the petitioner and his co-trustees, as such trustees as aforesaid, under the indenture took possession of the personal estate and effects of John Stainton, and sold some parts thereof; that, at the time of the issuing of the fiat, there remained in the hands of the petitioner and his co-trustees the sum of 105*l.* 7*s.* 4*d.*, being the proceeds of the sale, deducting auctioneer's charges; and that Theophilus Carrick, the official assignee, required the petitioner and the other trustees to hand over the same to him, without deducting the costs of preparing the deed, or the amount paid by the petitioner and his co-trustees for rent of the warehouse, and for the charges of the men kept in possession of the goods, amounting altogether to 28*l.*, or thereabouts. The prayer was, that the fiat might be annulled, and that John Stainton might be ordered to pay the costs of the application; and that the sum of 105*l.* 7*s.* 4*d.* might be repaid to the petitioner and his co-trustees, to be held and applied by them in payment of the charges therein mentioned, amounting to 28*l.* or thereabouts, and otherwise according to the trusts of the indenture.

1849.

Ex parte
BAINBRIDGE,
In re
STAINTON.

1849.

Ex parte
BAINBRIDGE,
In re
STANTON.

Mr. *Swanston* in support of the petition.—The fiat is substantially a nullity, since there is no property for it to operate upon, the trust deed being valid against the bankrupt, who sued out the fiat himself.

Mr. *Miller*, for the official assignee, contended, that at all events the official assignee's poundage should be deducted.

The VICE-CHANCELLOR:—

I am not prepared to say that the official assignee is entitled to poundage. Any necessary expenses, any monies properly paid out of pocket, should, I think, be repaid to him.

Mr. *Miller*, for the official assignee, said, that this question had not been submitted to the Court below; and he contended, that the Vice-Chancellor had only an appellate jurisdiction, and could not decide the question in the first instance.—He cited *Ex parte Lowe* (a) and *Ex parte Benson* (b).

The VICE-CHANCELLOR:—

This petition was presented before the New Act came into operation. I think, therefore, I ought to proceed with it.

Mr. *Bacon* appeared for the bankrupt, and asked that the bankrupt's costs might be paid out of the estate.

The VICE-CHANCELLOR:—

This is not a case in which I can give the bankrupt his costs. The official assignee, I think, should have his costs, and the petitioner's costs should come out of the fund.

(a) 1 Deac. & C. 30.

(b) 1 Deac. & C. 324.

The following was the order:—

- . This Court doth order, that the said official assignee do forthwith pay over to the said petitioner, and to Charles Thomas Bainbridge and Alexander Cowan, his co-trustees, upon the trusts of the said indenture, the sum of 105*l.* 7*s.* 4*d.* in the said petition mentioned; and all other monies received by him and now in his hands as such official assignee as aforesaid, after deducting thereout any payments properly made by him as such official assignee in respect of the estate of the said bankrupt, and also his costs of and occasioned by this application, when taxed, as hereinafter mentioned; but he is not to retain thereout any sum or sums whatever for his commission or poundage in respect of such monies so received by him as aforesaid; And it is ordered, that the said official assignee do forthwith deliver up to the said petitioner, and to the said Charles Thomas Bainbridge and Alexander Cowan, upon the trusts of the said indenture, all goods and effects, if any, now in his possession, custody, or power, as such official assignee as aforesaid; And it is lastly ordered, that the costs of the said petitioner, of and occasioned by this application, be paid out of the trust monies under the said indenture; And it is hereby referred to William Vizard, Esquire, an officer of this Court, to tax all the aforesaid costs.

1849.

Ex parte
BAINBRIDGE,
In re
STANTON.

1849.

Nov. 21st.

Ex parte ROBERT WALTER LEONARD, CHARLES ROSSITER, and
JOHN PERRY,

In the Matter of JAMES CARTER, a Bankrupt.

Petition of a petitioning creditor to annul the fiat, on the ground that his debt had been miscalculated, and was insufficient to support the fiat, dismissed with costs, the bankrupt opposing, and the assignees not consenting to it.

THIS was the petition of the petitioning creditors, seeking to annul the fiat for want of a sufficient petitioning creditor's debt. The case made by the petitioners was, that the amount of their debt had been miscalculated, and the fiat sued out inadvertently, the petitioners having forgotten a set-off of 7*l.*, which reduced the debt below 50*l.*

Mr. *Swanston* and Mr. *Mackeson* supported the petition, and submitted that the petitioning creditors were only doing their duty, which was, to have the fiat annulled when they discovered the insufficiency of the debt.

Mr. *Russell*, for the assignees, opposed the petition, and said that there was no other creditor who could sue out a fiat, the others having been parties to a composition deed. The assignees were willing to take the risk of acting under the fiat.

Mr. *Bird*, for the bankrupt, also opposed the petition, and submitted, whether, under the Bankrupt Law Consolidation Act, 1849, there was any jurisdiction to annul the fiat.

The VICE-CHANCELLOR:—

It is unnecessary to decide whether the Court has jurisdiction to annul this fiat, for, assuming that it has, I think, that, as the bankrupt opposes the petition, and the assignees do not consent, I ought not to accede to it.

Petition dismissed with costs.

1849.

Ex parte WILLIAM EDWARDS,

Nov. 24th.

In the Matter of WILLIAM EDWARDS.

THIS was an appeal from the decision of the Commissioner, declaring the appellant a bankrupt.

On the 16th of October, 1849, the appellant, being unable to meet his engagements with his creditors, and being in confinement for debt in the Queen's Prison, presented his petition to the Court of Bankruptcy for protection, under the arrangement clauses of the Bankrupt Law Consolidation Act, and, in support of it, made an affidavit in the form set out in Schedule (A b) to the Act, that he had "assets ready to be produced" to the Court "to the value of 200*l*. and upwards." A private meeting was on the 19th of October held, according to the provisions of the Act, at which no creditor attended to oppose; and at this meeting the appellant, being interrogated by the Commissioner as to the nature of the assets, stated, that he had property in Belgium and in France, and also a reversionary interest in property in England, which if sold would realise more than 200*l*. Afterwards, the petitioner being still a prisoner in the Queen's prison, made an affidavit, verifying an extract from the will of a testator named Allen, bequeathing one-fifth part or share of the testator's estate and effects upon trusts for the petitioner's wife for her life, for her separate use, and for her children after her decease. The affidavit stated, that the testator died on the 16th of July, 1829; that the petitioner's wife was still alive, and of the age of fifty-two years; that she had had ten children, of whom the eldest died on the 5th of August, 1843, having acquired a vested interest in her share of the said fifth portion of the residuary estate of the testator, and without having been married, or made any disposition of her share; and

An arranging debtor made the statutory affidavit, that he had assets ready to be produced, to the amount of 200*l*. On being examined, the only account he could give of those assets shewed, that he had some property abroad, and certain rights in reversionary property in this country, but which did not seem capable of realisation:—*Held*, to be shewn that the affidavit was wilfully untrue, and that the Commissioner had properly adjudicated the arranging debtor a bankrupt, although no creditor had intervened.

1849.

Ex parte
EDWARDS,
In re
EDWARDS.

that the petitioner was her next of kin, and as such entitled to her share. The affidavit also stated, that the whole of the estate and effects of the testator had not yet been got in; but that a sum of about 3400*l.* had been retained by the trustees of the will, as a portion of the fifth part of the residuary estate bequeathed in trust for the petitioner's wife and children; that an annuitant of 400*l.* per annum was still living, and that the sum set aside by the trustees to meet such annuity, with other property of the testator still remaining undivided, amounted to nearly 10,000*l.*; and that the petitioner's wife received annually, as interest upon the 3400*l.*, (which was invested on various securities,) 170*l.* or thereabouts; and that a further sum of 2000*l.* or thereabouts would accrue, upon the death of the annuitant, who was of the age of fifty-nine or thereabouts, to the fifth share bequeathed to the petitioner's wife and her children: and further, that the petitioner had made inquiries, and ascertained that the present value of the share of his deceased daughter in the said testator's property, subject to the lives of the annuitant and the petitioner's wife, was at the least 200*l.*, and would realise that sum if sold. The affidavit further stated, that, in addition to such present value of the share of the petitioner's deceased daughter, to which he was entitled as her next of kin, he had divers landed estates and personal property in the kingdom of Belgium, and also landed property in the republic of France, and also large debts, accounts, patent and other rights, property, claims, and demands in this country, the whole of very great value, and which ought to produce more than sufficient to pay and discharge all his debts and engagements; on the faith whereof, he was about to propose, under his petition, to pay such debts and engagements in full, by four instalments.

After filing this affidavit the petitioner applied by his

solicitor to Mr. Commissioner *Goulburn* to be brought up to be discharged out of custody, either absolutely or on condition.

The Commissioner, on the 3rd of November, 1849, made an order, which, after reciting the petition, was as follows:—"And whereas, after the filing of such petition, it has been shewn to the Court, that the affidavit filed with the said petition was wilfully untrue, so far as concerned the assets ready to be produced by him: thereupon this Court doth hereby adjudge such petitioner, the said William Edwards, a bankrupt, and doth adjourn all further proceedings in the matter into the Public Court; and this Court doth order and direct, that this its adjudication be advertised; and doth hereby appoint a sitting of the Court, to be holden on Saturday the 24th day of November inst., at eleven o'clock in the forenoon, for the choice of assignees; and another such sitting of the Court, to be holden on Saturday the 12th of January, 1850, at 12 o'clock at noon, for the last examination of the said bankrupt, as in bankruptcy."

From this order the present petition was an appeal, on the grounds that the recital in it was not according to the fact, and that the proceeding had been irregular, as having taken place in the Public Court instead of privately.

Mr. *Kenyon Parker* in support of the appeal.—The 223rd section, upon which alone the adjudication could be founded, provides, that if it shall be shewn to the Court by *any creditor*, that the debts of the petitioner have been contracted by fraud, or if it shall be shewn that the affidavit was wilfully untrue, the Court may adjudicate the debtor a bankrupt. The reasonable construction of this is, that in both cases it must be shewn by a creditor, whereas here no creditor intervened. Moreover, even if the Commissioner had the power so to adjudicate, the adjudication was bad

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upon the merits, since there was nothing to shew that the appellant had not assets ready to be produced, of the requisite amount, and certainly nothing to shew that the affidavit was wilfully untrue, so far as regarded the assets ready to be produced by the appellant.

The VICE-CHANCELLOR:—

It is true that certain matters are, by the 223rd section, required to be shewn by a creditor; but this is not one of them. The petitioner has explained what are the assets or supposed assets, by which he means to support the allegation that he has “assets ready to be produced to the Court, to the value of 200*l*. and upwards.” These appear to be the proceeds of a sale of certain rights and interests in reversionary property. It is possible, that the sale may or might produce the amount; but it is merely a possibility. I do not consider that the bankrupt has mentioned any kind of property which comes within the meaning of the expression used in the form prescribed by the Act. Therefore, upon the petitioner’s affidavit alone, and upon his own statement merely, it appears to me that the appellant has been well adjudged a bankrupt; and his petition must, therefore, be dismissed.

1849.

EDGSON v. EDGSON.

Nov. 3rd.

MR. BAGGALLAY moved for leave to make entry of a memorandum of service of a copy of the bill upon a defendant, by leaving it at the defendant's house, with a brother of the defendant, as being a member of his family. It did not appear that the brother resided there.

Seemle, that service of a copy of a bill, at the defendant's house, upon a member of his family, is not sufficient, unless the member of the family is an inmate of the house.

The VICE-CHANCELLOR:—

You may take the risk of the service, if you think fit; but it seems to me questionable whether the proof is sufficient. Does not the rule as to service upon some member of the family refer to domicile, and not to relationship?

RILEY v. GARNETT.

Nov. 6th.

JOHN GARNETT, by his will, dated 3rd of December, 1832, devised as follows:—"I give and devise all those five messuages or tenements, respectively numbered 6, 7, 8, 9, 10, together with so much of the other moiety or half part of the said garden as is freehold, unto the said John Garnett, James Soilleux, and James Lill, of Church-street, Bethnal Green-road, butcher, their heirs and assigns, upon trust to pay the rents and profits thereof, as the same shall from time to time arise and be received, into the proper hands of Mary Ann Elisha, the wife of Peter Elisha, of Bennett's-place aforesaid, hay salesman, another daughter of my said wife, during the term of her natural life, or otherwise to permit or suffer her to receive the same to and for her own sole and separate use and benefit, to the intent that the same may not be at the disposal, or subject or liable to the control, debts, or engagements, of her present or any future husband, but only at her own

Devise unto and to the use of trustees, their heirs and assigns, upon trust to pay the rents and profits to a married woman, for her separate use, for life; and, after her decease, in trust for all her children, who should attain twenty-one, or, being daughters, attain that age or marry, and their heirs and assigns for ever, as tenants in common:—*Held*, to give vested estates to all her children as they came into existence, subject to be divested

on their deaths under twenty-one, and (if daughters) unmarried.

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D. G. S.

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sole and separate disposal, and for which her receipt or receipts alone shall be a good and effectual discharge; and from and after the decease of the said Mary Ann Elisha, in trust for all the children of the said Mary Ann Elisha, by the said Peter Elisha begotten or to be begotten, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or be married, share and share alike, as tenants in common and not as joint tenants, and their heirs and assigns for ever. And as to the said slip or parcel of leasehold garden ground, I give and bequeath the same unto the said John Garnett, James Soilleux, and James Lill, their executors, administrators, and assigns, in trust for such person or persons as for the time being shall be entitled to the last-mentioned messuages or tenements, and the rents and profits thereof." And the testator thereby empowered the said James Soilleux, John Garnett, and James Lill, and the survivor of them, his executors and administrators, as to the freehold hereditaments and premises thereby devised or bequeathed to or in trust for his daughter-in-law and her child or children, as aforesaid, during the life of such daughter-in-law, and, after her decease, in case she should have any child or children living at her decease under the age of twenty-one years, then, during the minority or respective minorities of such child or children of such daughter-in-law, of the proper authority of the person or persons thereby empowered as aforesaid, from time to time to demise or lease in manner therein mentioned, all or any part or parts of the freehold and leasehold hereditaments and premises thereby devised or bequeathed to or in trust for such daughter-in-law and her children as aforesaid.

The testator died on the 17th of August, 1840, leaving Mary Ann Elisha and Peter Elisha her husband surviving. They had six children.

Mary Ann Elisha died on the 25th of October, 1840. At her death, Mary Ann Riley, one of her children, had

attained the age of twenty-one years; all the other five children were minors.

The present suit was instituted by Mary Ann Riley and her husband, seeking a declaration that she was absolutely entitled in fee to the whole of the freehold property devised in trust for her mother for life; and praying that the trustees might be ordered to convey the same to her, and to pay to her the rents accrued since her mother's decease.

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Mr. *Malins* and Mr. *Simpson* for the plaintiff.—This is a contingent remainder. It is only a devise to such children as attain twenty-one. And as the plaintiff Mrs. Riley was, at the determination of the particular estate, the only person comprised in the description, she took the estate absolutely: *Festing v. Allen* (a), *Bull v. Pritchard* (b). The argument on the other side may be, that this rule does not apply where the fee is vested in trustees. But it is very doubtful whether, in this case, the estate of the trustees extended beyond the life of Mrs. Elisha. If it did, still the only protection afforded by the legal estate would be against the effect of the determination of the life estate, by forfeiture or otherwise, during the life of the first taker; none would be afforded against the consequences of the determination by death, as regards contingent remainders. A limitation of an equitable estate, which, if it had been a legal estate, would have been a contingent remainder, is equally a contingent remainder, and does not become an executory devise because the estate is equitable. They also referred to *Mogg v. Mogg* (c), *Chapman v. Blissett* (d), *Doe v. Nowell* (e), *Fearne on Contingent Remainders*, 312, *Russell v. Buchanan* (f), *Barker v. Greenwood* (g), and *Curtis v. Price* (h).

(a) 12 M. & W. 279.

(b) 5 Hare, 567.

(c) 1 Mer. 654.

(d) Cas. temp. Talb. 145.

(e) 1 Mau. & Selw. 397.

(f) 2 Cr. & M. 561; 7 Sim. 628,
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(g) 4 M. & W. 431.

(h) 12 Ves. 89.

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Mr. *Chandless* and Mr. *Elmsley* for other children, contra, were not called upon.

Mr. *Stinton* appeared for a child born after the testator's death.

Mr. *Speed* appeared for the trustees.

All parties concurred in requesting the *Vice-Chancellor* to dispose of the question without the assistance of a Court of law.

The VICE-CHANCELLOR:—

My opinion is, that, although there is authority, and quite as much principle as authority, for saying that a devise “unto and to the use of” trustees and their heirs, without any restrictive words, may, by the context, be restricted to an estate pur autre vie, yet that mode of interpretation cannot be here adopted. I think that in this case such a restriction is rather excluded than introduced by the context, and that the whole legal estate is in the trustees. I am also of opinion, that, according to the true construction of the will upon the authorities preceding, and including *Doe v. Nowell* (a), there is an immediate equitable devise to all the children of Mary Ann Elisha, whether minors or not minors, living at the death of Mary Ann Elisha, (no child of this lady, I understand, died in her lifetime), subject to the contingency of their estates being divested upon their death in minority respectively; and that, therefore, there is an immediate title to the rents in all the children. That is my view, which it has been desired that I should state; but I should not refuse to either party the opportunity of taking the opinion of a Court of law, if it could be obtained.

A child who dies under twenty-one will lose all title to the body of the estate, but will not lose his title to the rents antecedent to his death.

(a) 1 Mau. & Selw. 397.

Declare that all the children are entitled to share in the estate, subject to the shares of those who were under twenty-one being divested in the event of their deaths under that age; and that the children are entitled to shares in the rents, whether of age or minors. Costs of all parties (those of the trustees as between solicitor and client) to be paid out of the rents in the hands of the trustees.

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Ex parte ANN WILKINSON,

Nov. 16th.

In the Matter of THE LONDON, BRIGHTON, AND SOUTH COAST
RAILWAY COMPANY;

AND

In the Matter of THE LONDON BRIDGE RAILWAY TERMINI
GENERAL ENLARGEMENT ACT, 1847,

AND

In the Matter of THE LANDS CLAUSES CONSOLIDATION ACT,
1845,

AND

In the Matter of ELIZABETH BUDDER's otherwise ELIZABETH
PALMER's TRUST.

THIS was the petition of the legatee of an annuity payable out of lands taken by the above Company.

Elizabeth Budder, otherwise Elizabeth Palmer, widow, by her will, dated the 20th day of April, 1838, bequeathed six leasehold messuages in the Maze and Alfred Court, in the parish of St. Olave, Southwark, unto George Sandham and Richard Woolford, upon trust, in the first place, by and

Leaseholds were bequeathed, upon trust, out of the rents and profits to pay an annuity of 52*l.*, for the life of the annuitant, and, "subject and without prejudice to the annuity," were bequeathed upon other

trusts, but without any trust for sale. They were purchased by a Railway Company under the provisions of the Lands Clauses Consolidation Act, and the proceeds paid into Court; but the income was insufficient to keep down the annuity:—*Held*, that portions of the corpus ought to be sold from time to time to satisfy the growing payments.

Night v Calender 2 D. M. & G. 654. Playfair v Cooper 17 Beav. 189. Craig v Hind 3 D. M. & G. 994 Re Baker's Est. 7 D. M. & G. 683. 12 Myer 62. Re E. 1126

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out of the rents, issues, and profits, to pay the ground rent and costs of insurance, and perform the lessee's covenants and agreements; and upon further trust, thereout to pay unto her daughter, the petitioner, the wife of Richard Wilkinson, during her life, an annuity of 52*l.*, by equal weekly payments, free from taxes, and clear of all other deductions whatsoever; the first weekly payment of the said annuity of 52*l.* to begin and be made on the Saturday next after the testatrix's decease; and she thereby declared that the said annuity should be paid by weekly payments as aforesaid into Mrs. Wilkinson's proper hands, for her sole and separate use, but not by way of anticipation; and subject thereto, upon trust to pay over the surplus (if any) of the rents, issues, and profits of the leasehold premises into the proper hands of the testatrix's daughter, Elizabeth Phillips, for her separate use for her life; and, after her decease, to stand possessed of the leasehold premises, subject to the annuity of 52*l.*, upon the same trusts as were thereafter declared concerning other leaseholds. These other leaseholds were bequeathed upon trust, after payment of the ground rent and insurance, to invest and accumulate the residue of the rents and profits in the way of compound interest, until the youngest for the time being of the four daughters of Elizabeth Phillips should attain her age of twenty-one years; and when and so soon as the youngest for the time being of them should attain her age of twenty-one years, then in trust for these four daughters in equal shares as tenants in common, to be vested interests in them respectively on their respectively attaining the age of twenty-one years, with benefit of survivorship, and also of accruer between or among them in the event of any or either of them dying under that age; and the testatrix bequeathed the residue of her personal estate unto her daughter Elizabeth Phillips, her executors, administrators, and assigns, absolutely; and she appointed George Sandham and Richard Woolford Innott her executors.

The will was proved on the 13th of June, 1840; two of the four daughters of Mrs. Phillips died under the age of twenty-one, and Mrs. Phillips died in the lifetime of the testatrix.

Under the power of the London Bridge Railway Termini General Enlargement Act, 1847, with which the Lands Clauses Consolidation Act, 1845, was incorporated, the Company contracted to purchase the six leasehold messuages from the trustees for 1100*l.*; which sum was, on the 5th of June, 1849, paid by the Company into the Bank, according to the provisions of the Lands Clauses Consolidation Act. There was now due to the petitioner the sum of 150*l.* in respect of arrears of her annuity, up to the 20th of October, 1849.

The prayer of the petition was, that the sum of 1100*l.* might be carried over, in trust in this matter, to an account to be intitled "The Account of Frederick Phillips and Alexander Fenton, the trustees, under the will of Elizabeth Budder otherwise Elizabeth Palmer, deceased;" and that 150*l.*, due to the petitioner on account of her annuity, up to the 20th of October, 1849, might be paid out of the 1100*l.* when so carried over; and that the residue, after such payment as aforesaid, might be laid out in the purchase of Bank 3*l.* per cent. Annuities; and that, out of the interest and out of the monies to arise from the sale from time to time of a competent part of the said annuities for that purpose, the Accountant-General might pay to the petitioner her annuity of 52*l.* during her life, or until further order.

Mr. Russell and *Mr. Chandless* supported the petition.

Mr. Bacon and *Mr. Rogers* for the residuary legatees.—The Lands Clauses Consolidation Act, sect. 17, directs the interest upon purchase monies to be paid to those who, if the sale had not taken place, would be entitled to the rents and profits. If the property had not been converted

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into money, the rents would have been sufficient to pay the annuity; but if they had not been, the annuitant would have had no right to call for a sale of the corpus. As the income has, from the act of the legislature, been diminished, the annuitant must suffer the loss.

Mr. *J. T. Humphreys* appeared for the husband of the petitioner.

The VICE-CHANCELLOR:—

Although the whole of the property consisted of chattel leaseholds, it does not necessarily follow, that, had the Act of Parliament not passed, and the property had remained unsold, the annuitant could have required a sale. I avoid giving any opinion upon that question. This I may say, that, had the Act of Parliament not passed, and the property remained unsold, those entitled under the will subject to the annuity, could never have claimed one shilling from the rents until the annuity and all arrears of it had been paid in full, either during the time of the annuitant's life or afterwards. That being so, and the Act of Parliament having passed, must the annuitant wait for the payment of the deficiency, or is she entitled to have the arrears raised out of the corpus of a permanent fund, which represents, by means of the provisions of the Act of Parliament, a perishable description of property? I am of opinion, that the annuitant is not bound to wait, but is entitled to be paid out of the corpus—a decision which I believe to be in conformity with *Forster v. Smith*.

As there is only one petition the Company must pay the costs.

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FAREBROTHER *v.* BEALE.Dec. 3rd &
6th.

THIS was a demurrer of one of the defendants to a bill of interpleader, for want of equity and multifariousness.

The bill stated, that the plaintiffs, Messrs. Farebrother, Clarke, & Lye, were auctioneers in copartnership, and that the demurring defendant Mr. Beale was or claimed to be, before July, 1849, a creditor of one Edward Thomas Delafield, in respect of money secured by a conveyance and assignment from him, with powers of sale of a certain copyhold estate at Willow Bank, Fulham, and of the goods, chattels, and effects there. The bill further stated, that, before the same time, another defendant named Walker was or claimed to be an incumbrancer upon the goods, chattels, and effects comprised in Mr. Beale's security; and that, previously to July, 1849, Mr. Beale, with the assent and concurrence of Mr. Walker, instructed the plaintiffs to sell by auction the copyhold property, and also the goods, chattels, and effects. The bill further stated, that a sale accordingly took place, commencing on the 2nd of July, 1849; and that, on the 13th of July, before the sale concluded, the plaintiffs were served with a notice that a fiat in bankruptcy had issued against Mr. Delafield, and that the person giving the notice was the solicitor to the petitioning creditor. The notice required the plaintiffs not to part with any portion of the proceeds of the sale. The bill further stated, that, on the 17th of July, the plaintiffs received another notice from the same solicitor, stating that an adjudication had been made, and requiring the plaintiffs to pay to the official assignee the property of the bankrupt, or arising from the sale of his estate. The bill further stated, that the gross produce of the sale was 10,182*l.* 7*s.* 6*d.*; and that, after certain deductions which the plaintiffs set forth and claimed to be allowed, there was left a balance in their hands of

Where a bill of interpleader stated a case for relief as between two of the defendants, but also set up the claim of a third, which was paramount and adverse to the claims of the two others:—*Held*, that, although this last claim might be one which could not support the bill, the introduction of it did not expose the bill to a successful demurrer on the part of one of the first-named defendants.

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8232*l.* 8*s.* 7*d.* as the clear produce of such sale. The bill then stated that Mr. Beale claimed to receive from the plaintiffs this sum, without reference to the demand of Mr. Walker, and had brought an action in the Court of Exchequer, which was then pending, for the amount; and that, on the other hand, Mr. Walker alleged and insisted, that the plaintiffs were affected with notice of his claim, and were liable to him in respect of it in case they should part with the 8232*l.* 8*s.* 7*d.* The bill further alleged, that the assignees of Mr. Delafield (the other defendants) alleged that the monies arising from the sale of the goods, chattels, and effects belonged to the bankrupt's estate, and required the plaintiffs to pay these monies to them, and threatened and intended to proceed at law against the plaintiffs for the purpose of recovering the same; and that Mr. Walker also threatened to take proceedings in respect of his claim. The prayer was, that the defendants might interplead touching the monies arising from the sale, the plaintiffs offering to bring the 8232*l.* 8*s.* 7*d.* into Court; and it also prayed for injunctions.

To this bill the defendant Beale alone demurred.

Mr. *Russell* and Mr. *C. Barber* in support of the demurrer.—The claim made by the assignees does not justify the filing of a bill of interpleader, since an agent cannot thus set up a claim under a title paramount to that of his principal: *Crawshay v. Thornton* (a). Nor will the alleged claim of the defendant Walker support the bill, because a bill of interpleader cannot be so framed as to interplead in respect of one matter with one party, and in respect of another matter with another. [The *Vice-Chancellor*.—In general the introduction of a superfluous defendant is no ground of demurrer on the part of any other defendant.

(a) 2 My. & Cr. 1.

Does not that rule apply to an interpleader suit?] We submit that it does not in such a case as this, because the introduction of the superfluous defendant sets up a case which the plaintiff is estopped from raising by the character sustained by him.—They also referred to *Nicholson v. Knowles* (a), *Cochrane v. O'Brien* (b), and *Masterman v. Lewin* (c).

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Mr. *Swanston* and Mr. *Hislop Clarke*, for the plaintiffs, cited *Jew v. Wood* (d), *Stuart v. Welsh* (e), *Pearson v. Cardon* (f), *Hoggart v. Cutts* (g), *Campbell v. Mackay* (h).

Mr. *Russell* in reply.

The VICE-CHANCELLOR:—

According to my present view of the record, a case of interpleader is stated between Mr. Beale and Mr. Walker. That leaves the question open, whether a case of interpleader is stated between them and the assignees of Delafield; and if not, what is the effect, upon Mr. Beale's rights in the suit, of the absence of such a statement? My present impression is, that, whether a case of interpleader is or is not stated as against the assignees, Mr. Beale is not entitled to demur. But I will read the record again carefully. Unless I mention the case again to the Registrar on Thursday, it must be taken that my opinion remains; but, if my view should be changed, the case will be placed in the paper.

The VICE-CHANCELLOR:—

I entertain the same opinion as I before expressed on this case. I have again read the bill more than once; and

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- (a) 5 Madd. 47.
- (b) 2 J. & L. 38.
- (c) 2 Ph. 182.
- (d) 1 Cr. & Ph. 185.

- (e) 4 My. & Cr. 305.
- (f) 2 Russ. & My. 606.
- (g) 1 Cr. & Ph. 197.
- (h) 1 My. & Cr. 603.

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my view remaining unchanged, I hold that the demurrer cannot be sustained. It is the demurrer of Beale only, no one else complains now. The demurrer must be overruled, and the costs will take their ordinary course.

Dec. 15th.

RUTLEY v. GILL.

Property was sold under a decree, subject to conditions, one of which was, that the purchase-money was to be paid into Court on or before the 30th of November, or that interest should be paid from that time, at 5*l*. per cent. The abstract was not delivered till October 18th, and the deeds were in the hands of mortgagees, who declined producing them without payment. On the purchaser's application on the 15th of December, the Court allowed him to pay in the principal and interest up to that day, without prejudice to any question and without acceptance of title.

THIS was a motion on behalf of George Nethercoat Cooke, a purchaser under the decree in the above cause, for liberty, on or before the 22nd of December instant, to pay into Court the sum of 551*l*. 13*s*. 2*d*., being the aggregate amount of 550*l*., the purchase-money of Lot 1, and of the sum of 1*l*. 13*s*. 2*d*., being interest on that sum from the 30th of November up to the said 22nd day of December, without prejudice to any question of title, and without prejudice to the right (if any) of the purchaser, on any application which he might be advised to make to the Court for repayment to him of the said sum of 1*l*. 13*s*. 2*d*., or for other compensation, by reason of the plaintiffs' not having verified their abstract of title by production of the title deeds, or by reason of any delay on the part of the plaintiffs or the vendors in completing the title, and without prejudice to such application as the purchaser might be advised to make for a return of a part of the said sum of 550*l*., or other compensation, by reason of any quit rents being charged on the said purchased premises.

The property was offered for sale by public auction on the 25th of September, 1849.

By the first condition of sale the purchaser was required to pay the amount of his purchase-money into Court on or before the 30th of November, 1849, and in default thereof to pay interest on the amount of his purchase-money at the rate of 5*l*. per cent. per annum from that day.

By the third condition of sale it was stipulated, that all

objections to the title, of which a statement in writing should not be delivered to or left at the office of Messrs. Fry & Loxley, solicitors for the plaintiffs, within thirty days after the delivery of the abstract, should be considered as waived.

On the 28th of September, 1849, Mr. Hill, one of the purchaser's solicitors, called at the office of the plaintiffs' solicitors, and requested to be furnished with the abstract of title relating to Lot 1; and, on the 8th of October, 1849, he wrote and sent a letter to the plaintiffs' solicitors, reminding them that the abstract had not been delivered.

On the 18th of October, 1849, the abstract was delivered, accompanied by a letter from the plaintiffs' solicitors, in which it was stated, that the title-deeds, except the probate of a will, a deed of renunciation, and a decree, were in the possession of the solicitors of certain mortgagees, from whom the plaintiff's solicitors would obtain an appointment for their examination.

The purchaser's solicitors made several applications to the plaintiffs' solicitors for an appointment for that purpose, but without effect, and at length on the 5th of November, 1849, received from them the following letter:—

“In answer to our repeated applications to Messrs. Metcalfe & Woodhouse, the solicitors for the mortgagees, to permit you to examine the abstract with the deeds, they have at length declined to do so, without some consent in writing, that the purchase-money, instead of being paid into Court under the conditions of sale, shall be paid to them direct. We have accordingly given them our assurance, that, upon application being made to the Court by the purchaser to pay in his purchase-money under the conditions of sale, we will appear thereon as the solicitors for the vendors, and ask that the purchase-money may be paid to the mortgagees in part discharge of their mortgage-debt; and we shall be obliged by your giving them a like assurance in writing, that, on the part of the purchaser, you will

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not object to an order being made to that effect; we will then call upon them with your letter, and obtain the necessary appointment for an examination of the deeds."

On the 6th of November, 1849, the purchaser's solicitors sent to the vendors' solicitors a letter, which was, so far as is material, as follows:—"Upon the understanding that the purchaser is not to pay over the money to the mortgagees without having a conveyance from all necessary parties (supposing he approves the title after investigation), and that he is not to be put to any additional expense by giving his assent, we shall make no objection to the offer."

On the 12th of November, the vendors' solicitors wrote as follows:—

"In reply to your letter of the 8th instant, we beg to assure you that the money will not be required until the conveyance is executed; and of course the days intervening between your request for an appointment to examine the deeds with the abstract, and your obtaining it, will not be included in the thirty days allowed to the purchaser to deliver objections to the title."

On the 3rd of December the purchaser's solicitors sent to the vendors' solicitors a copy of the requisitions of counsel on the title; and the objections and requisitions contained in such opinion had not yet been answered, nor had any answer been given to an inquiry as to the quit rents to which the lot was subject.

Mr. *Shapter*, in support of the motion, referred to *De Visme v. De Visme* (a), and *Greenwood v. Churchill* (b).

Mr. *Russell* for the plaintiff, objected to the money being paid into Court, on the ground that the purchaser had agreed to pay it to the mortgagees; and he contended, that, at all events, it could only be paid into Court on the ordinary terms.

(a) 1 Mac. & G. 336.

(b) 8 Beav. 413.

The VICE-CHANCELLOR gave leave for the purchase-money and interest to be paid into Court, without prejudice to any question; with a reference to the Master as to the title, and reservation of costs.

1849.

RUTLEY
v.
GILL.

WOODBURNE v. WOODBURNE.

1850.

Jan. 18th.

MARGARET HALL, by her will, dated the 31st of December, 1831, gave all her personal estate and effects to two trustees, upon trust to pay her debts and legacies, and then to place out at interest the sum of 3000*l.*, and to pay the interest thereof for the maintenance and education of Myles Walker Hall Woodburne, and also to place out at interest certain other sums therein mentioned, for the maintenance and education of other legatees, and directed, that, when the legatees should respectively attain the age of twenty-one years, the trustees should pay to them the principal sums above mentioned. She also declared, that, in case any of the legatees should happen to die before his or her legacy should become due or payable, leaving lawful issue, such issue should be entitled to the deceased parent's legacy, in the same manner as such parent, if living, would have been entitled thereto. And as to the residue of her personal estate, she directed the trustees to place the same out at interest, and to pay one moiety or half part of the interest thereof to Margaret Woodburne during her life; and that, after the death of the said Margaret Woodburne, one moiety or half part of the principal should be paid to Myles Walker Hall Woodburne, at the time when his other legacy became due and payable, for his own absolute use and benefit; and in case of his death without leaving lawful issue, then the same to be equally divided between his sister Jane Hall Woodburne, and his brothers, George Woodburne and Thomas Woodburne.

A testatrix bequeathed a sum of money, upon trust to pay the interest for the maintenance and education of an infant legatee, and directed that, when the legatee should attain twenty-one, the principal should be paid to him; but if he should die before his legacy became payable, leaving lawful issue, such issue should be entitled to the legacy. And the testator bequeathed one moiety of his residuary estate, upon trust, to pay the income to a tenant for life; and, after her death, to pay the principal to the above mentioned legatee, when his other legacy should become payable; with a bequest over in case of his death without leaving lawful issue. The legatee died in

the lifetime of the tenant for life, having attained twenty-one, but without having been married:—*Held*, that his representatives were entitled to the moiety.

Bowers v Bowers & Ry. 2 P. 4

1850.
 WOODBURNE
 v.
 WOODBURNE.

In 1832 the testatrix died.

In 1844, Myles W. H. Woodburne attained twenty-one, and some time afterwards died in the lifetime of Margaret Woodburne, without having been married.

The question was, whether the moiety of the residue bequeathed to him went over on his death without leaving lawful issue, or whether the bequest over was to be understood as requiring a death under twenty-one to bring it into operation.

Mr. *Russell* and Mr. *W. Rudall* for the plaintiffs, who claimed under Myles W. H. Woodburne, cited *Leeming v. Sherratt* (a), *Jones v. Jones* (b), and *Butterworth v. Harvey* (c).

Mr. *Cairns*, for a defendant in the same interest, cited *Mendes v. Mendes* (d).

Mr. *Torriano*, for the representatives of Jane Hall Woodburne, contra, cited *Galland v. Leonard* (e).

Mr. *B. L. Chapman* appeared for other parties.

The VICE-CHANCELLOR:—

I am not sure that there is any precedent exactly governing the construction of this will, in which it is a remarkable circumstance that a contingent interest is given to the issue of this legatee as regards the particular legacy, but that no contingent interest is given as regards the share of the residue. The contingent interest as to the particular legacy, is only given in the event of the legatee dying under twenty-one. Looking at the whole will, I think that the true meaning of it is, that the legatee, having attained his majority, did not lose his share of the residue, although he died without leaving any issue, but that his personal representatives take it subject to the estate for life.

(a) 2 Hare, 14.

(b) 13 Sim. 561.

(c) 9 Beav. 130.

(d) 3 Atk. 619.

(e) 1 Swanst. 161.

1849.

Dec. 5th.

Ex parte WELLS,
In the Matter of WELLS.

THIS was the petition of the bankrupt, appealing from the decision of the Commissioner, granting to the bankrupt a certificate of the first class, but suspending it for six months. The ground of the appeal was, that the assignees had been allowed to oppose the certificate without giving proper notice, the 198th section of the Bankrupt Law Consolidation Act providing, "that forthwith, after the bankrupt shall have passed his last examination, the Court shall appoint a public sitting for the allowance of his certificate (whereof, and of the purport whereof, twenty-one days' notice shall be given in the London Gazette and to the solicitor of the assignees), and, at such sitting, the assignees or any of the creditors of such bankrupt, who shall have given to the Registrar of the Court three clear days' notice in writing of his intention to oppose, may be heard against the allowance of such certificate."

Assignees may
oppose the cer-
tificate without
giving notice.

Mr. *Swanston* and Mr. *Morris*, in support of the appeal, contended, that assignees were, according to the fair import of the section, as much bound to give notice of their intention to oppose as a creditor was; and that there could be no reason for a distinction between the two cases.

The VICE-CHANCELLOR, without hearing Mr. *Russell* for the respondents, said, that, according to the ordinary and proper forms and idiom of the English language, the condition or requisition as to giving notice did not apply to the case of an opposition upon the part of the assignees. Supposing that to be so, it was, however, not decisive, if the subject-matter and the context of the section rendered a departure from that course of interpretation right. But

1849.

Ex parte
WELLS,
In re
WELLS.

in this case the construction, *primâ facie* right, was also right absolutely. If the bankrupt were taken by surprise, by an opposition upon the part of his assignees, he might apply to the Commissioner for an adjournment, to give him time to meet the opposition. No such application had here been made; the petitioner did not state to the Commissioner that he was taken by surprise, or ask for any delay. The petition must be dismissed, with costs.

Dec. 5th.

Ex parte ROBERT BRIERLY,

In the Matter of ROBERT BRIERLY, a Bankrupt.

Quære, whether an application to annul a fiat for equitable invalidity should not be made to the Commissioner in the first instance?

THIS was the petition of the bankrupt, seeking to have the fiat annulled for legal and equitable invalidity. The fiat was issued on the petition of a Mr. John Molesworth, who had acted as the attorney of the petitioner, and whose alleged debt, upon which the adjudication was founded, was stated by the petition to be in respect of an undelivered bill of costs for bringing and prosecuting an action on behalf of the petitioner, and of certain sums of money alleged to have been paid on the petitioner's account and at his request, but of which the petitioner stated that he knew nothing whatever. The petitioner stated, that he never was bound or liable to pay these sums, and never authorised the payment thereof, and was not indebted to John Molesworth in any sum of money, beyond, at the utmost, a few pounds; but that, on the contrary, John Molesworth was liable to him for damages in consequence of want of skill and of negligence on the part of John Molesworth in bringing and conducting the action. He further stated, that the fiat was sued out for the purpose of harassing, oppressing, and ruining the petitioner, and of preventing him from suing John Molesworth.

On the petition being called on, application was made for time to answer the affidavits.

1849.
Es parte
BRIERLY,
In re
BRIERLY.

Mr. *Bacon* appeared in support of the petition.

The VICE-CHANCELLOR.—Should not the original application to annul a fiat for equitable invalidity be made to the Commissioner?

Mr. *Bacon*.—This Court has all the jurisdiction which the Lord Chancellor had. The new Act of Parliament has not taken it away.

The VICE CHANCELLOR:—

I apprise you of the objection which presents itself to my mind as possible; but I give no opinion upon it.

The order was, that the petitioner should be at liberty to make such application as he might be advised to the Commissioner, for the purpose of annulling the adjudication, the assignees and the petitioning creditor, by their counsel, thereby undertaking not to raise any objection to such application in point of time: And it was ordered, that the petition should stand over in the meantime, with liberty to apply.

Dec. 21st.

1849.

Dec. 21st.
1850.
Feb. 16th &
20th.

Ex parte SAMUEL CARTWRIGHT, JOHN WARD, ANN his Wife, and THOMAS CARTWRIGHT, ANN CARTWRIGHT, and HARRIET CARTWRIGHT, by SAMUEL CARTWRIGHT, their Father and next Friend;

In the Matter of JOHN YATES, a Bankrupt.

A petition for the appointment of a new trustee in the place of a bankrupt, under the Bankrupt Law Consolidation Act, should be addressed to the Lord Chancellor, and heard by the Court of Chancery.

Where the bankrupt was served with such a petition he was held entitled to his costs.

THIS was the petition of cestuis que trustent under the will and codicil of Joseph Cartwright, who appointed the bankrupt his sole executor and trustee. The will contained no power to appoint a new trustee. The petitioner prayed that the bankrupt might forthwith be removed from continuing to be and to act as the trustee of the will and codicil; and that two new trustees might be appointed for the purposes of the will and codicil, in the stead of the bankrupt; and that Joseph Cope the elder and Edwin Gee might be appointed such new trustees; and for an assignment by the bankrupt. The petition was intitled in bankruptcy, and addressed to the Vice-Chancellor.

Mr. *T. S. Clarke* supported the petition.

The VICE-CHANCELLOR held, that, under the 130th section of the Bankrupt Law Consolidation Act, the application should have been made to the Court of Chancery, and the petition addressed to the Lord Chancellor.

1850.
Feb. 16th.

The petition, having been altered and presented accordingly, now came on to be heard.

Mr. *T. S. Clarke* supported the petition.

Mr. *Southgate*, for the bankrupt, asked for his costs out of the estate.

The VICE-CHANCELLOR thought this reasonable, and made the order accordingly.

In re Primrose 23 Decr. 591.

1849.

Ex parte MORTIMER and LAWRENCE,

Dec. 21st.

In the Matter of WHINERREY'S DEED OF ARRANGEMENT.

THIS was a petition of two of the creditors of an arranging debtor, named Robert Whinerey, of Liverpool, leather factor, appealing from an order or certificate of the District Court.

On the 31st of October, 1849, the debtor filed his petition, under the 224th and 225th sections (a) of the Bank-

Upon the hearing of a petition of an arranging debtor to a Court of Bankruptcy for a certificate, that a deed of arrangement has been duly signed by the requisite

majority of creditors, the Court ought to permit relevant questions to be put to the debtor by any creditor; and where the Court had declined to give this permission, the certificate was discharged upon appeal.

(a) Sect. 224 enacts: "That every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching such trader's liabilities and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior

or subsequent act of bankruptcy: Provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him."

Sect. 225. "No such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the Court an order or certificate of the said Court, declaring or certifying that such deed or memo-

*See also 4 Def. 8*l*. 226.*

1849.

Ex parte
MORTIMER,
In re
WHINERY'S
DEED OF AR-
RANGEMENT.

rupt Law Consolidation Act, 1849, stating that he had suspended his payments on the 26th of July, 1849; and that his creditors were seventy-three in number, and the total amount of his debts 31,750*l.* 15*s.* 2*d.*; and that a deed of composition and inspection, dated the 1st of October, 1849, had been signed by sixty-three creditors, whose debts in the whole amounted to 29,385*l.* 17*s.* 8*d.*; and praying that the Court would declare or certify the due execution of the deed, to the intent that the creditors who had not executed the same might be bound thereby.

On the same day, the arranging debtor, Robert Whinery, caused to be served upon his creditors, including the appellants, a notice, according to the Act, that a deed of composition and inspection between him and his creditors had been signed by six-sevenths in number and value of his creditors; and that he should apply, on the 16th of November, to the District Court of Bankruptcy at Liverpool for an order or certificate, declaring or certifying that such deed of arrangement had been duly signed by or on behalf of a majority of his creditors, according to the provisions contained in the Bankrupt Law Consolidation Act, 1849, in that behalf.

The petition came on before Mr. *J. Yate Lee*, the Registrar of the Court (the Commissioner being absent). The appellants attended by their solicitor, and opposed the petition, on the grounds of undue preference and incorrectness

of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the Court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment to make such order or cer-

tificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor, who shall not have had fourteen days notice of any intended application for such order or certificate as aforesaid, shall be bound thereby.

in the accounts; and the solicitor applied to the Registrar for leave to examine the debtor and the inspectors under the deed, who were present, as to the facts alleged; and stated, that, by such examination, it would appear not only that the accounts appended to the deed were incorrect, but that the formalities required by the statute had not been complied with.

The Registrar refused to accede to the application, holding that the Court, being satisfied by the inspectors that the deed was signed by the requisite majority of the creditors, was bound to grant the certificate, acting ministerially and not judicially. He accordingly certified as follows:—

“Memorandum.—That, having been attended this day by Mr. Lowndes, solicitor for the above-named Robert Whinerey, who produced before me, to be filed in this Court, the certificate of Harmood Banner and Harmood Walcot Banner, inspectors of the estate of the said Robert Whinerey under a certain deed of composition, bearing date the 1st day of October, 1849, to the effect that the said deed had been duly signed by or on behalf of a majority of six-sevenths in number and value of the creditors of the said Robert Whinerey, and also the affidavit of the said Robert Whinerey, verifying a certain list of creditors appended thereto: I did, pursuant to the said Bankrupt Law Consolidation Act, 1849, with respect to an arrangement with creditors by deed, declare and certify that such deed of arrangement had been duly signed by or on behalf of such majority of the creditors of the said Robert Whinerey, as aforesaid.” (Signed) “J. YATE LEE.”

Mr. Swanston and Mr. Shapter, for the petition, submitted, that the grounds upon which notice was required to be served upon the creditors must have been to ena-

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Ex parte
 MORTIMER,
In re
 WHINEREY'S
 DEED OF AR-
 RANGEMENT.

1849.

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MORTIMER,
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DEED OF AR-
RANGEMENT.

ble them to be heard upon the question, whether the deed was substantially a compliance with the terms of the Act, that is to say, whether the deed had been *duly* signed by or on behalf of the requisite majority of the creditors.

Mr. Bacon, Mr. Roundell Palmer, and Mr. Cairns, for the debtor, contended, that all that was required by the Act was, that the District Court should have been satisfied that the deed was duly signed by the requisite majority of creditors. It was not practicable for the Court to go into the details of the debtor's accounts; and therefore, if there was no reason for doubting the accuracy of the certificate of the inspectors who had gone into these details, the Court was justified in acting upon it, and was not bound to allow one of a dissatisfied minority to go into an irrelevant and vexatious examination. A *prima facie* case was all that was required; the validity of the deed would depend upon all the requisites being complied with, and not wholly upon the certificate, which was only one of them.

The VICE-CHANCELLOR:—

I apprehend, that, according to the true construction of the Act of Parliament, I am not bound to decline exercising jurisdiction in this case before the matter shall have been brought before the Commissioner personally. So viewing the Act, I ought not to cause the expense or delay that might probably or very possibly be occasioned by taking the course of remitting the point for the personal consideration of the Commissioner.

It cannot be matter of reasonable surprise, that a new enactment of this description, whether worded with more or less care, should be viewed by different minds differently; and, with deference to Mr. Lee, I find myself un-

able to take the view of it which he appears to have done.

The order or certificate which the 225th section authorises to be made was not and is not a superfluous, an unmeaning, act; it was meant to have a substantial operation upon the condition of the debtor and the respective rights of the debtor and his creditors; and it is not to be done without fourteen days' notice to the creditor. The creditor receives notice to attend. He then asks, that a relevant question may be put to the debtor, under the authority or with the permission of the Court, and in the presence of the Court, for the purpose of testing the accuracy of the debtor's statement. That permission is declined to be conceded to him, on the ground that the order or certificate to be made or granted by the Court is an act purely and merely ministerial. I confess that that is not my view of the case. If I had been in Mr. Lee's place, I should have allowed the question, being relevant, to be put to the debtor. As that is my opinion, I am bound to act upon it, and to discharge the order or certificate. My order is confined to that.

1849.

Ex parte
MORTIMER,
In re
WHINERREY'S
DEED OF AR-
RANGEMENT.

1850.

Jan. 16th. *Ex parte* WILLIAM NICHOLSON ALCOCK, HENRY ALCOCK, THOMAS BIRKBECK, WILLIAM ROBINSON, JOHN BIRKBECK, and GEORGE STANSFIELD, Bankers and Copartners, trading under the style or firm of THE CRAVEN BANK COMPANY;

In the Matter of THOMAS WEARING, a Trader Debtor.

A person alleging that he was a creditor of trader served him with a summons, (under 5 & 6 Vict. c. 122), which was dismissed upon the alleged debtor deposing that he verily believed that he had a good defence to the demand. Afterwards, the Bankrupt Law Consolidation Act having passed, the alleged creditor served the trader with another summons for an alleged debt, which was in part composed of the former demand:—*Held*, that the former dismissal was not of itself a sufficient answer to the summons.

THIS was an appeal from the decision of Mr. Commissioner *Ayrton*, dismissing a summons taken out by the petitioners against the respondent.

On the 11th of August, 1849, the petitioners caused the respondent to be duly served with particulars of demand on the part of the petitioners, and the usual notice requiring immediate payment thereof. The particulars comprised two accounts, numbered one and two, the total being 739*l.* 15*s.* 3*d.*

The respondent, not having complied with the petitioners' demand, a summons was issued out of the Court of Bankruptcy for the Leeds District against him, and duly served upon him under the provisions of the Act, 1 & 2 Vict. c. 110, s. 8.

The summons came on to be heard in the Bankruptcy Court at Leeds before Mr. Commissioner *Ayrton*, on the 24th of August, 1849; and, various technical objections having been taken to the summons, the Commissioner dismissed it, with costs.

Thereupon the petitioners commenced fresh proceedings against the respondent; and having learned that he only admitted that the account marked No. 2, was due from him, and that he complained that the petitioners ought not in fairness to proceed against him for the account No. 1, which he considered a joint account, the petitioners limited their demand to the amount due from him on his separate account, being the account No. 1, and caused him to be served with notice under the 5 & 6 Vict. c. 122,

claiming a balance of 378*l.* 9*s.* 1*d.*, and requiring immediate payment thereof; and this demand not having been complied with, the petitioners procured to be served upon the respondent a summons under the provisions of the statute, returnable on the 17th of September, 1849.

On the return of the summons, the respondent appeared and made oath, that he verily believed he had a good defence to the demand of the petitioners. The petitioners being then advised, that, under the Bankrupt Law Consolidation Act, 1849, which was shortly coming into operation, they would be entitled to obtain security for the payment of their demands, applied to the Commissioner, and requested him to dismiss the summons, with costs, instead of subjecting the petitioners to the obligation of commencing and prosecuting an action for the recovery of their demand.

Thereupon the Commissioner made the following order:—

“10th September, 1849.

“Be it remembered, that the within-named Thomas Wearing appeared before me in obedience to the within summons, and made and filed an affidavit of good defence to the demand of the within-named William Nicholson Alcock, Henry Alcock, Thomas Birkbeck, William Robinson, John Birkbeck, and George Stansfield; whereupon I do hereby order that the within summons be, and the same is, hereby dismissed, with costs, as prayed by the plaintiff.”

On the 11th of December, 1849, after the Bankrupt Law Consolidation Act came into operation, the petitioners obtained a fresh summons for the whole demand of 739*l.* 15*s.* 3*d.*; but the Commissioner dismissed the summons, on the ground that one part of the demand was answered by the former affidavit of a good defence, and that there was no precedent for dismissing a summons as to part of a demand only.

1850.

Ex parte
ALCOCK,
In re
WEARING.

1850.

Ex parte
ALCOCK,
In re
WEARING.

Mr. *Swanston* and Mr. *Birkbeck* supported the appeal.

Mr. *Bacon* and Mr. *Dickinson* were for the respondent.

The VICE-CHANCELLOR adverted to the words "or any part thereof," in the 79th section; and said, that, with deference to the learned Commissioner, he thought it competent to the Commissioner to enter into the question respecting both debts, or at all events one of them; and that the summons ought not to have been dismissed, at least at that stage. His Honour expressed his willingness to hear the whole matter discussed at once as to the propriety of requiring a bond.

After some discussion, it was arranged that a bond should be given.

1849.

March 29th,
May 30th.

1850.

Jan. 25th.

An agreement was entered into for the purchase of 4000 tons of iron rails, at 12*l.* 12*s.* 6*d.* per ton, according to a section to be delivered by November 1st, 1846; and 11,500*l.* was to be paid by the purchaser by way of deposit. According to the custom of the trade, this deposit was to be retained by the seller as a security against any damages from the non-performance of the contract. The deposit was paid in bills of exchange. In June, 1846, the purchaser became bankrupt. On the bills becoming due, they were dishonoured:—*Held*, that the vendors were entitled to prove upon two of the bills remaining in their hands.

Ex parte HENRY BOLCKOW and JOHN VAUGHAN,

In the Matter of DONALD MACLEAN, a Bankrupt.

THE petitioners, who carried on business in partnership, under the firm of Bolckow & Vaughan, at Middlesborough, sought to prove against the estate of the bankrupt, upon two bills of exchange for 2000*l.* each, the proof having been rejected by the Commissioner.

In the month of February, 1846, a contract was entered into between the petitioners and the bankrupt, to the following effect.

"Middlesborough on Tees, 25th of February, 1846."

Memorandum of Agreement between Messrs. Bolckow & Vaughan, of Middlesborough on Tees, and Donald Maclean, Esq., M. P., Wilton Castle, Durham, That the former agree

damages from the non-performance of the contract. The deposit was paid in bills of exchange. In June, 1846, the purchaser became bankrupt. On the bills becoming due, they were dishonoured:—*Held*, that the vendors were entitled to prove upon two of the bills remaining in their hands.

to sell, and the latter to buy, 4000 tons of railway bar iron, of good merchantable quality, equal to No. 3 of double or single headed section, to weigh from fifty-six to eighty-six pounds per yard, at 12*l*. 12*s*. 6*d*. per ton, delivered free on board vessel or loaded in railway waggons at Middlesborough. Section to be handed in on or before the 1st of November, 1846, and delivery to commence as soon as convenient to sellers, but not later than the 1st of February, 1847, and to be completed at the rate of 400 tons per month. The rails to be paid for in cash, without discount, on delivery of each parcel; and in case delivery is not taken, buyer to pay on receipt of certificate of every 400 tons being ready at the works or railway warehouse. Sellers agree to transfer this contract to any responsible party the buyer may direct, without, however, relieving him from his responsibility. Buyer further agrees to pay as deposit the sum of 11,500*l*."

The deposit of 11,500*l*. was provided for in conformity with a custom prevailing in the iron trade, and was intended to be a security to the petitioners for the performance by the bankrupt of the contract on his part, and to be retained against any damages which the petitioners might sustain by reason of his non-performance thereof.

The bankrupt did not make this deposit; and in March following it was agreed between the petitioners and the bankrupt, that approved bills or notes to the amount of 11,500*l*. should be handed by him to the petitioners in substitution of a cash payment, and by way of satisfaction of the stipulation for deposit. Accordingly, on the 11th of March, the bankrupt handed to the petitioners four bills or notes: his promissory note dated 9th of March, 1846, for 5000*l*., payable at six months' date; a bill dated 2nd of March, 1846, drawn by William Wilks on and accepted by the bankrupt for 2500*l*., payable six months after date; and two bills, dated one the 6th, and the other the 9th day of the same month of March, respectively drawn by William

1849.

Ex parte
BOLCKOW,
In re
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MACLEAN.

Wilks on and accepted by the bankrupt, each for the sum of 2000*l.*, payable six months after date.

The petitioners thereupon signed and delivered the following letter or memorandum to the agent of the bankrupt.

“ London, March 11th, 1846.

“ We have received this day from Mr. Maclean (through Mr. Rogers) the following bills, being the amount of the deposit on the contract for 4000 tons railway bars, dated 9th instant.

£5,000, Mr. Maclean's note, at six months' date, to order of Miss. Maitland.

£2,500, Mr. Maclean's acceptance to William Wilks, at six months.

£2,000, . Do. . Do. . at six months.

£2,000, . Do. . Do. . at six months.

£11,500.”

The petitioners negotiated the promissory note for 5000*l.* and the bill for 2500*l.*, and retained in their own hands the two bills for 2000*l.* each. The note and bills, on becoming due, were dishonoured, and still remained wholly unpaid.

On the 30th day of June, 1846, the fiat issued. The petitioners alleged, that, from the time of entering into the contract, they had always been ready and willing to perform it; but that, at the time of the issuing of the fiat, the bankrupt had not handed in to them the section referred to by the contract, in accordance with which the iron, the subject thereof, was to be manufactured, nor had any section been subsequently handed in; so that the petitioners were prevented from performing the contract on their part.

After the making of the contract, and throughout the period fixed for the delivery of the iron, the market price

of railway bar iron, similar to that which was the subject of the contract, was considerably less than the price fixed by the contract; so that the contract, if duly carried into effect, would have been a highly beneficial one to the petitioners, and they consequently had, as they alleged, sustained large damage, and to an amount considerably exceeding the amount of the two bills retained by them, and, in fact, exceeding the amount of the whole stipulated deposit.

At an adjourned dividend meeting, held under the said bankruptcy before Mr. Commissioner *Evans*, on the 24th day of January, 1849, for the purpose of receiving proof of debts, the petitioners tendered a proof for 4000*l.* upon the two retained bills of exchange of the 6th and 9th days of March, 1846; but the Commissioner refused to admit the proof. The prayer was, that the petitioners might be allowed to prove for 4000*l.* upon the two bills.

Mr. Russell and *Mr. Goodeve* in support of the petition.

Mr. Bacon and *Mr. Cole* for the assignees.

The VICE-CHANCELLOR:—

Assuming these petitioners to be entitled to say, that, as far as they are concerned, the apparent transaction was the true one, I am not prepared to say that there can be no right of proof in respect of these bills. What should be the amount proved is a different question. Without expressing or intimating any dissent from the cases which have been decided upon the subject of proofs tendered in respect of unliquidated damages, I am of opinion, with deference to the learned Commissioner, that the existence of the bills of exchange in this case constitutes a valid distinction between it and them. The question remains, whether the apparent transaction was the true one? I am

1849.

Es parte
BOLCKOW,
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1849.
Es parte
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In vs
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not satisfied, upon the present materials, that it was. That question should be investigated in some way.

After some discussion the case stood over for a *vivâ voce* examination.

May 30th.

On this day Mr. Bolckow and Mr. Rogers were examined *vivâ voce* by Mr. *Russell*, Mr. *Goodeve*, and Mr. *Bovill* for the petitioners, and by Mr. *Bacon* and Mr. *Cole* for the respondent.

The VICE-CHANCELLOR said, that the evidence had satisfied him of the good faith of the transaction; and his Honour directed a reference to Mr. Commissioner *Goulburn*, to inquire what, if any, amount of damages had been sustained by the petitioners through the non-performance of the contract, having regard to the circumstances of the case.

The Commissioner, by his certificate, found, that, having heard evidence upon the matters in question, and having had regard to the circumstances which had taken place respecting the note for 5000*l.* and the bill for 2500*l.*, and all the other circumstances of the case, no amount of damages had been sustained by the petitioners through the non-performance of the contract. The Commissioner, however, certified, that he had calculated the damages upon three suppositions, in the event of the Vice-Chancellor differing from him in opinion, and thinking that the petitioners were entitled to claim damages. The damages calculated on the first of such suppositions were taken at the amount of the profit which would have been made by the petitioners, if they had made and delivered the rails pursuant to the contract, which profit would have amounted to 28,500*l.* The damages calculated on the second of such suppositions were taken at the loss which the

petitioners would have sustained if a section had been delivered in pursuance of the contract, and the bankrupt or his assignees had refused to accept delivery of the rails, and the petitioners had thereupon sold the rails to other parties in the market at the prices of iron at the times stipulated for delivery: such loss would have amounted to 15,800*l*. The third of such suppositions was, the difference of price between the sum mentioned in the contract and that in another contract with the Leeds and Thirsk Company, which had been referred to, or the loss which the petitioners sustained by taking the above contract with the Leeds and Thirsk Company in February, 1847, for the making and delivery of 5000 tons of rails at times as near to those mentioned in the contract with the bankrupt as they could do. This last difference or loss amounted to 12,700*l*. But the Commissioner was of opinion and reported, that the petitioners were not entitled to assess damages upon any one of such suppositions.

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Ex parte
 BOLCKOW,
In re
 MACLEAN.

The petition now came on to be disposed of.

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 Jan. 26*th*.

Mr. Russell, Mr. Goodeve, and Mr. Bovill, in support of the petition. The only question is, whether the damage sustained by the petitioners does not constitute sufficient consideration for these bills of exchange? It is clear, that the bills could not have been taken out of their hands until the contract had been performed. It is admitted, that the non-performance of it has arisen from the default of the bankrupt and of the assignees, who never delivered the section. They referred to *Gainsford v. Carroll* (a), *Phillpotts v. Evans* (b), *Stewart v. Cauty* (c), *Tempest v. Kilner* (d), *Dunlop v. Higgins* (e), and *Robinson v. Harman* (f)

(a) 2 B. & C. 624.

(b) 5 M. & W. 475.

(c) 8 M. & W. 160.

(d) 3 C. B. 249.

(e) 1 H. L. Cas. 381.

(f) 18 L. J., Exch., 202.

1850.

Es parte
BOLCKOW,
In re
MACLEAN.

Mr. *Bacon* for the assignees.—No damage is shewn to have been sustained by the petitioners. Their case is merely one of hypothetical loss, and is only a disappointment in making certain expected profit. There was no breach of contract, moreover, before the bankruptcy; the time for delivery of the section had not arrived.

Mr. *Bovill* replied.

The VICE-CHANCELLOR:—

In all the circumstances of this case, assuming no proof to have been admitted upon the proceedings, I am of opinion that these two notes for 4000*l.* ought to have been admitted to proof. The costs of all parties should come out of the estate.



Feb. 11*th*.

Ex parte THOMAS HICKIN,

In the Matter of GEORGE ELLINS, a Bankrupt.

Where a clerk assisted his master in perfecting an invention, for which a patent had been obtained, upon an agreement to be paid out of the profits, but which agreement had no reference to his duties as clerk: *Held*, that he was not precluded from proving for his remuneration as a clerk, or from receiving three months' salary in full.

THIS was a petition appealing from the rejection of a proof.

The bankrupt carried on business at saltworks at Droitwich, and also as a banker, under the style of the Stourbridge and Kidderminster Banking Company.

On the 17*th* of June, 1844, the petitioner was engaged by the bankrupt as cashier and book-keeper, and continued from the 17*th* of June, 1844, until the 10*th* of December, 1848, to act in that capacity, without any salary having been paid or agreed upon.

On the 10*th* of December, 1848, the bankrupt was preparing a balance-sheet, for the purpose of laying before his creditors, when the petitioner was requested by him to agree upon the amount of salary to be paid to him; and it

was then arranged between the bankrupt and the petitioner, that the petitioner should receive at and after the rate of 250*l.* per annum, from the 17th of June, 1844. The reason why the petitioner never came to any arrangement, except as aforesaid, was stated to be, that the bankrupt was possessed of a patent for manufacturing salt, and was, as the petitioner knew, expending large sums of money in bringing this patent to bear. The petitioner stated, that the bankrupt had promised him, for the assistance which he had afforded in perfecting the patent, a small share thereof; and that, under these circumstances, he did not press for more money than he actually required for necessities. The claim was for 817*l.* 10*s.*, being the balance due for the petitioner's services at the above rate.

On the 29th of December, 1849, the petitioner applied to prove his debt under the fiat, and to receive three months' wages in full, under the 168th section of the Act; but the Commissioner rejected the proof altogether, on the ground that the petitioner looked to the share in the patent, which was promised to him, for remuneration, and not to any stipulated or agreed sum by way of salary.

The petitioner now stated by his petition and affidavit that he never looked to the share in the patent as a remuneration for his services, except for such additional services as were not within the scope of his duty as cashier and book-keeper. The prayer was, that he might be at liberty to prove his debt under the fiat, and might be declared entitled to receive three months' wages in full.

Mr. *Glasse*, in support of the petition, cited *Ex parte Harris* (a).

Mr. *Bagshawe*, jun., was for the assignees.

(a) 1 De Gex, 165.

1850.

Ex parte
HICKIN,
In re
ELLINS.

The VICE-CHANCELLOR:—

Upon the evidence before me, I think that the petitioner was a clerk or servant; but the evidence does not shew satisfactorily what the salary was to be. Unless the parties can agree as to the salary, the case must go back to the Commissioner, with a declaration that the petitioner was a clerk.

March 16th.

Ex parte JOHN CALDWELL,

In the Matter of JOHN CALDWELL, against whom an Adjudication in Bankruptcy has been made.

The circumstance of the affidavit in support of a petition for adjudication being sworn before a Master Extraordinary in Chancery, who was the solicitor of the petitioning creditor, —*held* not sufficient ground for annulling the adjudication.

THIS was the petition of a trader, appealing from the decision of the Commissioner finding him a bankrupt. The grounds of the appeal were, irregularities in the affidavit in support of the petition for adjudication, and want of any act of bankruptcy. The irregularity principally relied upon was, that the affidavit was sworn before a Master Extraordinary, who was the solicitor to the petitioning creditor.

Mr. *Russell* and Mr. *Wheeler* in support of the petition.—The jurat is improper, and such that an indictment for perjury would not lie upon the affidavit. With regard to the officer before whom it was sworn, it was most improper that he should be the solicitor by whom the proceeding was taken.

The VICE-CHANCELLOR said, that he only desired to hear the respondent's counsel upon the point as to the affidavit being sworn before the solicitor of the petitioning creditor.

Mr. *Swanston*, for the respondent, cited *Ex parte Elford* (a), and *Anonymous* (b).

(a) 2 G. & J. 65.

(b) Mont. 136.

Mr. *Wheeler* in reply.—The change in the bankrupt law renders *Ex parte Elford* no longer applicable. The docket affidavit was a mere preliminary proceeding; whereas the petition for adjudication and the affidavit in support of it constitute the record, and stand in the place of the commission.

1850.
Ex parte
 CALDWELL,
In re
 CALDWELL.

The VICE-CHANCELLOR:—

With respect to the attestation, I must hold that this jurat would have been sufficient in the Court of Chancery; and I am not aware of any difference in the practice of the Court of Bankruptcy in this respect. I cannot accede, therefore, to the objection upon this subject. The other objection seems to have more force; and had it not been for the authority of Lord *Eldon*, which has been referred to, I should probably have annulled the fiat on that ground. But giving all the weight which I ought to the difference between the old and the new law, and seeing that there is a material difference in many respects between a petition and a commission, still I do not think that there is difference enough to enable me to annul the adjudication upon this ground, without departing from Lord *Eldon's* authority. I must, therefore, refuse to accede to this objection also.

The case then proceeded; and ultimately the petition was ordered to stand over, with liberty for the petitioner to bring an action.

1850.

March 18th.

Ex parte WOODFORD,

In the Matter of JOHN WILCOCKS, EDWARD WILCOCKS, and
ALEXANDER FRAZER, Bankrupts.

Where the joint debts of a bankrupt firm had been paid in full, and monies forming part of the separate estate of one of the bankrupts had been set apart to answer certain unclaimed dividends, but without any specific appropriation to that purpose:—
Held, that the creditors entitled to the dividends, on claiming them, were entitled to the interest which had been allowed by the bankers in the interval.

THIS was an appeal, by way of special case, from the decision of the Commissioner. The special case stated in substance as follows:—

On the 17th of July, 1810, a commission of bankrupt was issued against John Wilcocks, Edward Wilcocks, and Alexander Frazer, upon which they were duly declared bankrupt, and assignees were appointed, of whom one only, Samuel Kingdon, now survived.

The amount of debts proved under the commission against the joint estate was 39,770*l.*, and the amount of the joint estate was 34,520*l.*; consequently, there was a balance of 5250*l.* to be provided for out of the separate estates of the several partners.

Alexander Frazer's separate estate was insufficient to pay anything towards the deficiency; consequently, the only funds out of which it could be provided for were the estates of John Wilcocks and Edward Wilcocks.

Edward Wilcocks' estate fell short of the amount required to be raised for his portion of the deficiency of the joint estate by the sum of 98*l.*, which sum was left to be provided for out of the separate estate of John Wilcocks. This estate, however, was more than sufficient for the discharge of its own as well as Edward Wilcocks' share of the deficiency.

On the 7th of May, 1811, a dividend was declared of 11*s.* in the pound on all debts proved against the joint estate.

Subsequently, a second dividend of 8*s.* in the pound was declared.

On the 23rd of May, 1812, a final dividend of 1*s.* in the pound was declared; and interest was allowed on certain

debts which bore interest, up to the time of each dividend, from the date of the commission, and formed parts of the sums allowed for dividend.

On the 25th of August, 1812, the assignees executed a release to John Wilcocks of the surplus of his separate estate, after provision had been made for the deficiency with which it was chargeable.

Messrs. Williams, Sparkes, & Co., then carrying on the business of bankers, in Exeter, under the firm of the General Bank, were duly appointed bankers to the estate at the meeting for the choice of assignees. The firm was afterwards changed, and the assets and liabilities of the bank were taken by Messrs. Sparkes & Co.; and they afterwards sold their business to the Devon and Cornwall Banking Company.

The assignees kept two accounts with bankers: one, their general account; the other, called their "separate account." To the latter account, money was transferred from the general account, to meet dividends, and was the exact sum required for such dividends, but was not in any other manner appropriated thereto. Mr. Lee, an accountant employed by the assignees, paid the dividend to such creditors as applied for the same, by drawing cheques on the separate account. The last dividend so paid was paid on the 31st of October, 1823. The bankers debited themselves with interest on this separate account every half year, it being the custom of the bank to allow interest on accounts current; and this continued to the 30th of June, 1843, when the Devon and Cornwall Banking Company, who had, on the 1st of July, succeeded Messrs. Sparkes & Co., gave notice to the surviving assignees that there was a sum of 1075*l.* 9*s.* 2*d.* standing to their credit, and that they should thenceforth decline to allow any interest thereon.

The assignees did not comply with the provisions of the 5 & 6 Will. 4, c. 29, ss. 6, 7, the whole matter having es-

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caped their recollection up to the time of receiving the notice from the Devon and Cornwall Banking Company.

On the 17th of July, Francis Hernaman was appointed official assignee; and, on the 16th of October, 1849, he received from the Devon and Cornwall Banking Company the sum of 1116*l.* 10*s.* 5*d.*, being the amount of principal and interest due on the separate account, and including a balance of 3*l.* 18*s.* 9*d.* due on the general account. Since his appointment, he had paid the representative of one creditor of the bankrupts his dividend, but no interest was claimed or paid.

The amount of unclaimed dividends, at the time of the appointment of the official assignee, was 444*l.* 17*s.*, and the interest which had accumulated amounted to 667*l.* 15*s.* 1*d.* John Wilcocks died in 1837, and his personal representatives now claimed the interest which had accumulated on the unclaimed dividends.

On the 7th of December, 1849, an application was made to the Commissioner of the Exeter District Court by John Woodford, a creditor, who had proved a debt of 14*l.* against the estate, for payment of the sum of 6*l.* 6*s.*, being the amount of the second dividend at the rate of 8*s.* in the pound, and of the third dividend at the rate of 1*s.* in the pound, (the first dividend, at the rate of 11*s.* in the pound, amounting to 7*l.* 14*s.*, having been paid to him on the 13th of July, 1811); and it had been paid accordingly. He also claimed interest in respect of the sum of 6*l.* 6*s.* The latter claim was disputed by the solicitor for the personal representatives of John Wilcocks, who applied for an order on the official assignee to pay the amount of the interest to those representatives.

The number of creditors entitled to unclaimed dividends was 428. The dividends had principally arisen from proofs under 5*l.*; and there was little probability that many of such dividends would ever be claimed.

The accumulated interest was equal to 1*l.* 10*s.* in the

pound on the dividends remaining unpaid. This matter having been brought on, and the Commissioner having heard all the parties, postponed his decision until the 18th of February, 1850, when he declared his opinion to be, that Mr. Woodford was not entitled to the accumulated interest, upon the ground that the money in the bank to the credit of the "separate account" remained part of the estate of the bankrupts, according to the authority of *Green v. Weston* (a). And as to the claim of the representatives of the bankrupt, the Commissioner was of opinion that they were not entitled to the sum claimed, inasmuch as the 5 & 6 Will. 4, c. 29, ss. 6, 7, and 12 Vict. c. 106, s. 191, required such money to be paid to the credit of the Accountant in Bankruptcy.

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The opinion of the Court was sought upon the following points:—

First, whether Mr. Woodford was entitled to the sum he claimed?

Secondly, if not, whether the assignees were bound to pay the sum to the Accountant in Bankruptcy or to the legal representatives of the bankrupt?

Mr. *Malins* and Mr. *Willcocks*, in support of the appeal, cited *Ex parte Renshaw* (b), *Ex parte Holford* (c), *Ex parte Doxat* (d). They also referred to *Ex parte Jamieson* (e).

Mr. *Russell* and Mr. *T. H. Terrell*, for the representatives of the bankrupt *Wilcocks*, claimed the accumulations of interest, on the ground that the separate estate of their testator had overpaid what was due from it.

Mr. *Follett* was for the assignees.

The VICE-CHANCELLOR:—

The bankers having no claim to the interest, there re-

(a) 3 Myl. & Cr. 388.

(d) Cited 4 D. & C. 483.

(b) 4 D. & C. 483.

(e) 3 Mont. & A. 715.

(c) 4 D. & C. 798.

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WILCOCKE.

main but three parties who can be entitled,—the creditors, the personal representatives of the bankrupt from whose estate the fund has arisen, and the public. Any claim on the part of the public appears to me not sufficiently plausible to require even service on the Attorney-General. There remain, therefore, only the creditors and the representatives of the bankrupt. The assignees having kept two distinct accounts, one of which appears to have comprised only the dividends due to the creditors, I think that those dividends must be treated as their property. Probably the Commissioner would have so decided, had the cases now cited been called to his attention.

Costs out of the aggregate fund.

March 25th.

Ex parte EMMA GRACE MARSHALL,

In the Matter of WILLIAM HASKAYNE, a Bankrupt.

Where a trustee invested part of the trust monies upon a mortgage, with a power of sale, and a trust for the mortgagor, in the event of there being a surplus, and became bankrupt, —*held*, that the mortgagor was not a necessary party to a petition, under the Bankrupt Law Consolidation Act, for the appointment of a new trustee.

THIS was a petition under the Bankrupt Law Consolidation Act, 1849, for the appointment of a trustee of a will in the place of the bankrupt. Part of the testator's assets had been advanced by the trustees upon a mortgage, with a power of sale, and a declaration of trust as to the surplus, (after paying the mortgage debt and interest), for the benefit of the mortgagor. A question was suggested, whether the mortgagor was a necessary party to the petition under the terms of the Act.

Mr. *Baggallay* supported the petition.

The VICE-CHANCELLOR held that the order might be made without the mortgagor being before the Court.

1850.

Ex parte JOHN JONES,

In the Matter of JOHN JONES, a Bankrupt.

March 11th
& 26th.
May 29th.

THIS was the petition of the bankrupt, appealing from the refusal of the Commissioner to discharge him from prison, under the 112th section of the Bankrupt Law Consolidation Act, 1849, providing, that where a bankrupt, who has surrendered and obtained his protection, is in prison for debt at the time of his obtaining such protection, the Court may, except in certain specified cases, order his immediate release, without prejudice to the rights of the detaining creditor, except the right of detaining the bankrupt in prison whilst protected by the order of the Court.

According to the petition and the affidavits in support of it, the respondent Mr. George Haigh and his partner Mr. Brabner had been employed by the bankrupt as his solicitors in certain proceedings in Chancery, instituted by him against another solicitor formerly employed by him. The proceedings were ultimately compromised; but during their progress, and before the compromise was effected, Messrs. Brabner & Haigh requested the petitioner, as he now stated by his affidavit, to give them security for their costs, and for any further costs to be incurred or advances made by them; and accordingly, on the 13th of July, 1846, the petitioner executed a mortgage to them for securing any sum which might be or become due, not exceeding 2000*l*.

He had, a few days previously, executed to the mortgagees a warrant of attorney for securing 500*l*., on which judgment was immediately entered up. Contemporaneously with the execution of the warrant of attorney, Messrs. Brabner & Haigh gave to the petitioner the following memorandum:—

A bankrupt, who had unsuccessfully applied to be discharged from imprisonment under the protection clause of the Bankrupt Law Consolidation Act, 1849, renewed his application after his last examination:—
Held, that it was to be regarded as an original application, and that its refusal gave a new right of appeal.

Where a bankrupt is in prison when he obtains his protection, the Court will not order him to be discharged, unless it appears that his discharge will be useful in the administration of his estate.

Quære, whether costs of proceedings in bankruptcy before the Vice-Chancellor are within the 249th section of the Bankrupt Law Consolidation Act, 1849.

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"(Private).

"Dear Sir,—We take it that our advances to and on your account will be about 500*l.*, for which you consented to give the warrant of attorney, on an understanding that before we issue writ of execution we should speak to you on the subject.

"Yours truly,

"2nd July, 1846.

"BRABNER & HAIGH."

"John Jones, Esq.

On the 11th of April, 1849, the petitioner was arrested (as he deposed, at the instigation of George Haigh) on an attachment for not having put in his answer to a bill in equity, and he was thereupon taken to Lancaster Castle on the 13th of April then instant.

On the 17th of April, 1849, Mr. Haigh lodged a detainer against the petitioner, under which and a detainer of another creditor, the petitioner still remained in custody. He afterwards put in his answer to the bill in equity.

Subsequently, he filed his petition in the Insolvent Court at Lancaster; but was advised, that, being a trader, he ought properly to apply to the Court of Bankruptcy. On the 13th of July, 1849, he sued out the present fiat against himself, and, having surrendered, obtained his protection.

On the 17th of July, 1849, he made an application to the Commissioner *Stevenson*, to be discharged from custody, by virtue of his protection; but the Court refused to make any order.

The following was the memorandum then made by the Commissioner:—

"Upon an application this day made by Mr. Bolden, as attorney for the bankrupt, for the discharge of the bankrupt out of custody, and also to examine Mr. Geo. Haigh, the detaining creditor of the said bankrupt, respecting his dealings and transactions with the bankrupt, he having been duly summoned for that purpose and present in Court,

and after hearing Mr. Lowndes on behalf of Mr. Haigh, I do order that such application for the bankrupt's discharge be refused; and I also refuse to allow Mr. Haigh, the detaining creditor, to be examined respecting his dealings and transactions with the bankrupt with reference to the debt under which the bankrupt is now detained in custody, such examination appearing to me to be proposed to be made on behalf of the bankrupt with the view to the present application for his discharge, and not for the purposes of the bankrupt's estate."

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In re
JONES.

An appeal against this order was dismissed, as not having been brought within the time limited by the Bankrupt Law Consolidation Act, 1849.

Afterwards, the bankrupt passed his last examination, and again applied to be discharged; whereupon the Commissioner made the following memorandum:—

"Mr. Bolden, the solicitor for the bankrupt, having this day renewed his application to examine Mr. Haigh, and to discharge the bankrupt; and on referring to the file of proceedings in this bankruptcy, I find that, on the 14th day of January last, I did adjudicate upon the same matters; and it being declared by Mr. Bolden that he had no new grounds to assign (except the circumstance that the bankrupt has this day passed his last examination), I decline to rehear the matters then decided by me, or to make any further order on the subject."

From this decision the petitioner now appealed, and prayed that the Court would order his immediate release from custody, either absolutely or upon such conditions as the Court should think fit, or would order the application made by the petitioner for his discharge from custody to be remitted back for the consideration of the District Court, with directions that the petitioner should be at liberty to examine Mr. George Haigh respecting his dealings and

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transactions with the petitioner in all matters relating to the debt for which the petitioner was then in custody.

Mr. *Malins* and Mr. *Jolliffe* supported the petition.

Mr. *Bacon*, for the creditors, objected that it was a mere contrivance, for the purpose of appealing after the statutory time. He referred to *Sanderson's case* (a).

The VICE-CHANCELLOR said, that, since the former application, the circumstances of the case had been varied by the bankrupt having passed his last examination, and having undergone further imprisonment. The second application to the Commissioner did not, therefore, seem to be a mere repetition of the former, nor did the case appear to his Honour to be within the reason upon which *Sanderson's case* was decided.

March 26th. The case, having stood over for affidavits to be filed, came on to be argued upon this day.

Mr. *Malins* and Mr. *Jolliffe*, for the bankrupt, relied upon the section of the Act above referred to.

Mr. *Bacon*, for the opposing creditors, contended that the provision in question was framed for the benefit of the creditors, and not of the bankrupt.

The VICE-CHANCELLOR:—

The bankruptcy was of the bankrupt's own seeking. He made himself a bankrupt, and took this course after filing a petition in the Insolvent Debtors' Court, which he abandoned in favour of a bankruptcy. All considerations belonging peculiarly to a case in which a person has been

(a) 3 De G. & S. 66.

made a bankrupt unwillingly or by a creditor, are out of this case. The matter stands thus: In 1847 a judgment was obtained in an action of assumpsit against the bankrupt (an adverse action) by consent upon the eve of trial. The judgment was complete in 1847, and no step was taken, as I understand, in equity or otherwise, to invalidate, impeach, or question it. I must assume that judgment to be legally and equitably sustainable. Is there, however, any ground for believing that the principal money due on the judgment has been discharged or diminished? Even if the interest has been discharged, it does not appear that the principal has been discharged or diminished. I must take it to be an existing *bonâ fide* debt due from the bankrupt. He will be discharged from it if he shall obtain his certificate, without which he cannot be discharged, unless under the terms of the clause of the Act which has been referred to. Now it has not been shewn to me that his discharge from imprisonment would be useful to the administration of his estate. So far (if at all) as the Act affords any guide as to the grounds on which this discretionary power is to be exercised, the present case does not appear to me to be one within the intention of the Act.

If the debt of the detaining creditor were suspicious, or reasonably questionable, that might or might not be a ground. But upon that point, I wish to intimate no opinion. I see no ground on which I can act in the present case, and must dismiss the petition, with costs.

1850.
Ex parte
 JONES,
In re
 JONES.

An order having been drawn up accordingly, and the costs not having been paid, *May 29th.*

Mr. *Bacon* on this day moved on behalf of the respondent for a writ of *capias ad satisfaciendum* for 97*l.* 16*s.* 10*d.*, being the amount of the costs as taxed. The application

1850.

Ex parte
JONES,
In re
JONES.

was made under the 249th section of the Bankrupt Law Consolidation Act, 1849, which provides that "the Court" may in all matters before it award such costs as to such Court shall seem fit and just; and that, in all cases in which costs shall be so awarded against any person, it shall and may be lawful for "such Court" to cause such costs to be recovered from such person, in the same manner as costs awarded by a rule of any of the superior Courts at Westminster may be recovered. In support of the motion, he referred to the 1 & 2 Vict. c. 110, s. 18, making an order whereby any costs are payable of the same force as a judgment, and to the General Orders in Bankruptcy giving the forms of writs of fieri facias in such a case. Those Orders did not give any form of a capias, and therefore a special application became necessary.

The VICE-CHANCELLOR said, that, according to the interpretation clause of the Bankrupt Law Consolidation Act, 1849, "the Court" meant the Court of Bankruptcy, and the Act did not appear clearly to constitute any Vice-Chancellor a part of the Court of Bankruptcy. He could not make an order for imprisonment under a doubtful authority. The only order which he could make would be the ordinary four-day order.

1849.

Dec. 20th.

Ex parte TOURNAY.

THIS was the petition of Mr. Tournay, presented under the Act for the relief of trustees, stating that Joseph Newington, by his will, dated the 21st of October, 1844, disposed of his property upon certain trusts, and that he appointed Mrs. Newington, Mr. Tournay, and another person the executors; that Mrs. Newington alone proved the will, and died in 1848; that the petitioner thereupon proved the will; and that he paid the balance of the trust funds of the testator's estate, amounting to 1915*l.*, into Court, under the provisions of the Act for the relief of trustees; and that he had, since he had so paid in the amount, discovered that debts and liabilities of the testator to a considerable amount remained undischarged; and he prayed that the sum of 1915*l.* might be paid out to him, in order that he might apply it in discharge of the debts and liabilities.

An executor, three years after the death of his testator, paid the balance of the testator's assets in his hands into Court, under the Act for the relief of trustees. Afterwards, the executor discovered that there were debts of the testator to a considerable amount unpaid. Upon his petition, the money paid in was paid out to him on his undertaking properly to apply the fund.

Mr. *G. W. Collins* appeared in support of the petition.

Mr. *Lloyd*, Mr. *Hardy*, and Mr. *R. W. Moore* appeared for several persons named by the petitioner in his affidavit, made on his paying the money into Court.

The VICE-CHANCELLOR made the order asked, on the petitioner undertaking properly to apply the fund.

1850.

Jan. 26th.

BEECH v. LORD ST. VINCENT.

A testator devised estates to trustees for ninety-nine years, upon trust, during twenty-one years, and so much longer during the life of his only son as there should be in existence any younger children or child of his son, to raise 2000*l.* per annum, and to invest and accumulate this annual sum, and stand possessed of it and the accumulations, upon certain trusts thereby declared, being trusts for the son's younger children; and, subject to the term, the estates were devised to the use of the son for life, with remainder to the use of his first and other sons successively in tail, with remainders over:—*Held*, that the trusts for accumulation were valid, being a provision for raising portions within the exception in the *Thelluson Act*.

JAMES BEECH, the testator in the cause, and the late father of the plaintiff, was, at the times of making his will and of his death, entitled to large freehold and copyhold estates in the county of Stafford and the county of Derby, and in other parts of England, and was also possessed of a very large personal estate. By his will he gave, devised, limited, and appointed all his manors, and all other freehold and copyhold messuages, lands, tenements, tithes, rents, and hereditaments and premises situate in the several counties of Stafford, Derby, and York, or wheresoever else the same might be situate, unto Edward Jervis Lord St. Vincent, then Edward Jervis Rickets, Richard Clarke Hill, and Rowland Swann, and their heirs, to the use of his said trustees, and their executors and administrators, for twenty-one years, if any one of the testator's children should so long live and remain a minor, and, being a daughter, unmarried, upon certain trusts for the maintenance and education of the testator's children during their minorities; and from and immediately after the determination of the said term, and in the meantime subject thereto, the testator limited all the said hereditaments to the use of the same trustees, their executors, administrators, and assigns, for the term of ninety-nine years, to commence from the day of his decease, upon trust, by means of the rents, issues, and profits of the hereditaments comprised in the term, or by mortgage, sale, or other disposition thereof, or of a competent part thereof, for all or any part of the same term, or otherwise, as therein mentioned, to levy and raise, during so much of the natural life of the plaintiff, James Beech, the testator's only son, as should fall within the period of twenty-one years from the testator's death, and also during such other times or time of life of the plaintiff as there should be in existence and actually born any children or

child of the plaintiff entitled by virtue of the trusts thereafter declared to the benefit of the sum to be accumulated, from time to time, an annuity or clear yearly sum of 2000*l.*, clear of all deductions whatsoever for taxes or otherwise, on the 24th of December in every year, the first payment to be made on such of the said days of payment as should next happen after the plaintiff should come into possession of the estates. And the testator declared, that the said annuity was to be received, held, and applied by his said trustees, upon the trusts, and to the several ends, intents, and purposes thereafter expressed; and after the expiration or other sooner determination of the said term, and in the meantime subject thereto, and to the trusts thereof, the estates were limited to the use of the plaintiff and his assigns for his life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the first son of the body of the plaintiff in tail general, with remainder to the second and other sons of the plaintiff successively in tail general, with remainder to the daughters of the plaintiff as tenants in common in tail general, with cross remainders between or among them in tail general, with remainders over. And the testator further declared and directed, that the annuity or yearly sum of 2000*l.* thereinbefore given to his trustees was so given to them upon trust, that they, or the survivors or survivor of them, or the executors or administrators of such survivor, should from time to time lay out and invest the same in the purchase of a competent share in the parliamentary stocks or public funds of Great Britain, or upon mortgage or other real security, and from time to time alter and transpose the said securities as they or he should think fit, and receive and take the interests, dividends, and yearly proceeds thereof when as the same should become payable, and lay out and invest and transpose the same in like manner as the principal monies, so that the whole thereof might accumulate in the way of compound interest, until the

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decease of the plaintiff, and then upon trust to stand possessed of the whole of the accumulated fund in trust for all and every the younger children of the body of the plaintiff, exclusive of an eldest or only son, to be paid to such younger children, or any one or more of them, at such age or ages, day or days, time or times, and subject to such provisos, conditions, restrictions, and limitations over, such limitations over to be for the benefit of one or more of such younger children, with such provision for the maintenance of such younger children until their portions should respectively become due and payable, as the plaintiff, by any deed or deeds, instrument or instruments in writing, to be by him legally executed, or by his will, should appoint, and in default of appointment, and subject thereto, the accumulated fund was to be equally divided among all such younger children, except as aforesaid, the shares of sons to be paid at their respective ages of twenty-one years, and of daughters, at their respective ages of twenty-one years or days of marriage, which should first happen, with a proviso for survivorship; and a proviso that, if the plaintiff should not have any child, or should have one child only, or a daughter or daughters only and no son, or if all his children, or all save one, or save a daughter or daughters only, should die under the age of twenty-one years, and without issue (if sons), or under that age and unmarried (if daughters), then the trustees were to stand possessed of the trust money in trust for the executors, administrators, and assigns of the plaintiff, as part of his personal estate. And the testator declared, that the plaintiff should, under the doctrine of election, be bound to give effect to the trust for the accumulation of the said sum of 2000*l.* a year for the benefit of the plaintiff's younger children. And the testator directed, if necessary, that the said trust should be executed so far as it might be by the rules of law or equity, although part of the said trust might be incapable of taking effect under

the rules of law or equity. And the will contained a power for the plaintiff, when in possession of the estates, to charge the same with any sum or sums of money, for a portion or portions of a daughter or daughters and younger son or younger sons, as should make up their whole portion, together with and in addition to the accumulations of the aforesaid yearly sum of 2000*l.*, which should have been accumulated at the time of plaintiff's decease, equal to 10,000*l.* for each daughter or younger son who should not become entitled to the first estate of freehold in his real estates.

The testator died on the 30th of October, 1828, leaving the plaintiff his only son and heir-at-law. The plaintiff, upon attaining the age of twenty-one years on the 24th of December, 1833, entered into possession of the devised estates as tenant for life thereof, under the limitation of the will; and the trustees had, from time to time, down to the 30th of October, 1849, continued to raise, out of the rents and profits of the estates, the annual sum of 2000*l.*, as directed by the will, and had invested the sum so raised in the purchase of Consols, and accumulated the income. The accumulations amounted to 41,556*l.* 9*s.* 1*d.* Consols. In 1843, the plaintiff married, and had issue of the marriage one child only, viz. Cecil James Beech, an infant of the age of four years, one of the defendants, and the tenant in tail in remainder.

The term of twenty-one years from the day of the decease of the testator having expired on the 30th of October, 1849, the said trustees had, in conformity with the provisions of the will, ceased to raise the annual sum of 2000*l.*, there being then and still no younger child of the plaintiff in existence.

Upon the expiration of the twenty-one years, the plaintiff requested the trustees to pay to him the dividends thenceforth during his life to accrue in respect of the accumulated fund of 41,556*l.* 9*s.* 1*d.* Consols; but they al-

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leged that they could not safely do so save by the direction of the Court.

The plaintiff thereupon instituted this suit, insisting, that, according to the true construction of the will, the accumulation of the income arising from the accumulated fund ought to cease at the same period as the raising of the annual sum of 2000*l.*, whence that fund had arisen; and if not, then that so much of the said will as directed the said fund to be accumulated beyond twenty-one years was wholly void, as contrary to law; and that, in either case, the plaintiff was entitled, as heir-at-law of the said testator, to receive the dividends and income to arise from the said funds, as being undisposed of by the will.

The plaintiff also submitted, that the provision in the will for election on the part of the plaintiff referred to certain other estates, which were settled by a deed of the 9th day of February, 1804, and which the testator had not power to dispose of as he had done by his will, but the disposing whereof the plaintiff was willing and thereby offered to confirm.

Mr. Bacon and *Mr. Campbell* for the plaintiff.—The trust for accumulation is clearly bad beyond the twenty-one years, unless the case is within the second section of the *Thelluson Act* (a). In order to come within this section the accumulation must be a provision for raising a portion. Now,

(a) 39 & 40 Geo. 3, c. 98, s. 1:
—“That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such

grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, deviser, or testator, or during the minority or respective minorities of any person or persons who shall be living or in ventre sa mere at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who, under the

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a provision of this kind cannot be considered to be properly described as a portion in any sense. Moreover, the Act cannot mean that the trust itself is to be considered as constituting a portion. The word portion must mean a charge already existing upon the estate, which is to be paid off by the accumulation. It is associated with the word debts, which must mean debts then in existence.

In the next place, the portion must be one which is to be raised for the benefit of children or a child of some person taking an interest under the will, which must also mean children or a child then in existence.

At all events, as there were no objects when the twenty-one years ceased, and are now none, the trust is by the terms of it at an end.—They cited *Shaw v. Rhodes* (a), *Haley v. Bannister* (b), *Powell v. Cleaver* (c), *Eyre v. Marsden* (d), *Ellis v. Maxwell* (e), *Halford v. Staines* (f).

uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void; and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Sect. 2. "Provided always and be it enacted, that nothing in this Act contained shall extend

to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed."

(a) 1 My. & Cr. 135; 5 C. & F. 114, nom. *Evans v. Hillier*. See Sugden's Law of Property, 325.

(b) 4 Madd. 275.

(c) 2 Bro. C. C. 499.

(d) 2 Keen, 564.

(e) 3 Beav. 587.

(f) 13 Jur. 73. 46 Jan. 1812.

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Mr. *Wigram* and Mr. *A. J. Lewis*, for the tenant in tail, and Mr. *Malins* and Mr. *Cracknell*, for the trustees, were not called upon.

The VICE-CHANCELLOR:—

Independently of the Act, the accumulation is plainly well directed, and the demand made by this suit unsustainable. The question therefore is, whether the present case is within the Act. The cases exempted from the operation of the Act by the second section must be decided exactly as they would have been if the Act had never passed. This section provides—[His Honour read it].

It has been suggested as doubtful whether the word “portions” in this section can be construed as confined to “portions” existing as charges independently of the instrument in question. I think that the word may well extend to a fund appropriated to the purpose of raising future portions, which only have their existence under the instrument itself.

The next question is, whether the term “portion” is properly applicable to a gift of this description. The testator was a person having large landed property, and by the will makes his son tenant for life of it, subject to this provision, that an annuity of 2000*l.* per annum shall be deducted from the income during twenty-one years, and so much longer as his son should happen to have any daughter or younger son alive.

This money is to be laid out and accumulated, and the accumulated fund is to belong to the daughters and younger sons of the plaintiff. I am of opinion that such a provision is a portion; and that, therefore, the word “portion” is correctly applicable to it.

The next question is as to the persons for whom this provision is made. They are clearly children of a person taking an interest under the instrument, and therefore within the provisions of the section.

The only remaining question is, whether the words "any child or children" must be confined to existing children, or extend to those who may afterwards come into existence. And on this point I am of opinion that it is not necessary to give the more confined interpretation to the clause, but that it extends to children thereafter to come into existence.

These provisions seem to me effectually taken out of the Act by the Act itself; and as by the law, independently of the Act, the trust is valid, I think that the accumulation, which has reached 42,000*l.*, cannot be stopped: but the question was a reasonable one, and the costs may come out of the fund (a).

(a) See *Jones v. Maggs*, 9 Hare, 605.

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FROGGATT v. WARDELL

Jan. 30*th*.

JOHN ATKINSON WARDELL, by his will, dated the 15th of October, 1845, devised and bequeathed as follows:—"I give and bequeath to my youngest son, Martin Wardell, the whole of my real property, whatsoever and wheresoever, with all the rents, issues, and profits thereof, to him and his heirs for ever; provided nevertheless that if the said Martin Wardell should die unmarried, then I give and bequeath the said real estate to his three sisters, Ann Burton, Eliza Wardell, and Frances Stutter, share and share alike; to my daughter, Frances Stutter, 5000*l.* Three per Cent. Consolidated Bank Annuities."

A testator, having by her will given a legacy of 5000*l.* to a married daughter, made a codicil revoking the legacy, and, in lieu thereof, gave 2500*l.* to her husband, and 2500*l.* in trust for the daughter and her children, free from all debts or liabilities of her husband:—*Held*, that the daughter was entitled

By a codicil of the 17th of April, 1846, the testator be-

to the income of the 2500*l.* for her life, with remainder to all her children as to the capital.

A testator devised all his real property to his youngest son and his heirs, but if he should die unmarried, then to his sisters and their heirs. By a codicil, he declared that he left in trust to his executors the whole of the property of every description which he had willed to his youngest son:—*Held*, that the beneficial disposition made by the will was not revoked, but that the executors took subject to the trusts thereby declared.

Mason v. Clarke 17 Beav. 128.

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queathed as follows:—"And whereas I have given by my will to Frances Stutter, my daughter, 5000*l.* Consols, now I hereby declare such gift to be utterly void and of no effect. In lieu whereof I give to John Stutter her husband 2500*l.*, and 2500*l.* in trust for the said Frances Stutter and her children, free and clear from all debts or liabilities of her said husband."

On the 18th of April, 1846, the testator made the following codicil:—"I hereby declare that the whole of the property of every description that I have willed to my son Martin Wardell, I leave in trust to my executors and Brumbridge Burton, Esq."

The suit was instituted by one of the executors, for the opinion of the Court on the construction of the above will and codicils.

Mr. *Teed* and Mr. *Steere* were for the plaintiff.

Mr. *K. Parker* and Mr. *De Gez*, for Mrs. Frances Stutter, contended, that, upon the will and codicil, there was a plain intention to give to her a life interest in the 2500*l.*, with remainder to her children. They cited *Crawford v. Trotter* (a), *Morse v. Morse* (b), *Vaughan v. The Marquis of Headfort* (c), *French v. French* (d), *Bain v. Lescher* (e), *Crockett v. Crockett* (f), *Sutton v. Torre* (g), and an unreported case there referred to as having been decided by the Vice-Chancellor of England upon the construction of another part of the same codicil, which was the subject of that suit.

Mr. *Wigram* and Mr. *Craig*, for the children of Mrs. Rutter, contended that they took with her a present in-

(a) 4 Madd. 361.

(b) 2 Sim. 485.

(c) 10 Sim. 639.

(d) 11 Sim. 257.

(e) 11 Sim. 397.

(f) 2 Ph. 553.

(g) 6 Jur. 231.

terest as joint tenants in the capital of the 2500*l.*—They referred to *Bustard v. Saunders* (a), *De Witte v. De Witte* (b), *Scott v. Scott* (c), *Cunningham v. Murray* (d), *Ogle v. Cawthorn* (e).

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Mr. *Bacon* and Mr. *Ayrton*, for Martin Wardell, submitted that the devise to him and his sisters was not, as to the beneficial interest, revoked by the second codicil.

The VICE-CHANCELLOR:—

The legacy of 5000*l.* given by the will was not given to the separate use of Mrs. Stutter. With regard therefore to the 2500*l.* given by the codicil to Mr. Stutter, it may be thought that the testator as to that sum does not materially depart from what he had done by his will. As to the other 2500*l.*, by the bequest of this portion the codicil seems to revoke the interest which the husband would have taken in it under the will. It seems unlikely that the testator intended any part to belong to the daughter absolutely. The testator gives 2500*l.* in trust for Frances Stutter and her children, and then comes this phrase “free and clear from all debts or liabilities of her said husband.” According to the arrangement of the words, the whole of the 2500*l.* is given free and clear from all debts or liabilities of the husband. Without expressing assent or dissent upon the subject of any of the authorities cited, the true construction of this codicil appears to me to make Mrs. Stutter tenant for life of the latter 2500*l.* And I think the bequest to her children not confined to children now in existence.

With respect to the real estate there must be a declara-

(a) 7 Beav. 92.
(b) 11 Sim. 41.
(c) 15 Sim. 47.

(d) 1 De G. & S. 366.
(e) 9 Jur. 325.

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tion that it is to be held in trust for the same purposes as those declared by the will.

The costs must come out of the residuary personal estate, except as regards the costs of establishing the will, which must be paid out of the real estate.



Jan. 30th.
 Feb. 7th &
 12th.

COOPER v. THE EARL OF POWIS.

A shareholder in an incorporated Company, on his own behalf alone, filed a bill against the Company and the directors, but not making in any other manner, by representation or otherwise, any other member of the corporation a party, the object of the suit being to prevent the Company from making only a part of the line, and from applying to Parliament for authority so to do:—*Held*, that the suit was defective for want of parties, the case being analogous to that of a suit by a cestui que trust against a trustee complaining of a breach of trust, and not making other cestuis que trustent parties; and a demurrer ore tenus on this ground was allowed, without costs.

THIS was a demurrer to a bill filed by a shareholder in a Company incorporated by Act of Parliament, and called the Shropshire Union Railways and Canal Company. The bill sought to restrain the Company from petitioning or applying to Parliament for any Act authorising the Company to abandon the formation of the railways authorised to be made under their existing Acts. The bill stated, that the Company had deposited in the Private Bill Office of the House of Commons a bill, intitled "A Bill to authorise the abandonment of part of the undertaking of the Shropshire Union Railways and Canal Company, and to alter some of the provisions of the lease thereof to the London and North Western Railway Company;" and submitted that such a change in the objects of the Company was contrary to the agreement, on the faith of which he took shares; and that, as the corporation seal was affixed to the petition, he could not be heard before the House of Commons in opposition to the bill, and had no remedy except by injunction.

The Company, the directors, and the London and North Western Railway Company were the defendants. The demurrer was for want of equity; but a further ground was taken at the bar that the plaintiff could not sue without

costs.

having the other shareholders represented distinctly from the Company.

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Mr. *Bacon* and Mr. *Willcock*, for the Company, in support of the demurrer.—In the first place, the suit is defective, being instituted by the plaintiff on his own behalf only, and the other shareholders being unrepresented.

In the next place, there is no equity affording a ground for the interference of the Court. The proper course for the plaintiff to have taken, if he had any cause of complaint, would have been to apply to be heard in Parliament against the bill. The bill does not allege that the Company would object to a shareholder being heard.—They referred to *Parker v. The River Dunn Navigation Company* (a), *Ware v. Grand Junction Waterworks Company* (b), and *Foss v. Harbottle* (c).

The VICE-CHANCELLOR:—

Assuming that no sufficient case is made for an injunction to restrain the defendants from applying to Parliament, I still think that a case is stated on the bill which may entitle the plaintiff to relief. The only question to which the plaintiff's counsel need address themselves, is that respecting the constitution of the suit as to parties.

Mr. *Malins*, Mr. *Roundell Palmer*, and Mr. *Westoby* in support of the bill.—There was no demurrer in *Parker v. The River Dunn Navigation Company* (a), nor in *Ward v. Society of Attornies* (d). In neither of those cases was any objection taken for want of parties, although those suits were constituted as this is. Nor could any such objection have

(a) 1 De G. & S. 192.

(c) 2 Hare, 461.

(b) 2 Russ. & My. 470.

(d) 1 Coll. 370.

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been taken. The principle is, that any individual of a class may file a bill on his own behalf, if he chooses to seek only relief for himself. There can be no doubt that he is entitled to sue alone, and the only question is, whether it was necessary to make the other shareholders defendants. We submit that it was not. The plaintiff entered into a contract with the corporation. All the other individual shareholders are included in the corporation, which is a defendant. This is not a bill concerning the affairs of the corporation, but one to enforce the plaintiff's separate and individual rights against the corporate body. The cases cited on the other side do not establish any impropriety in the constitution of the present suit. In *Mozley v. Alston* (a) two individual shareholders filed their bill, complaining that certain persons were acting, and assumed to act, as directors, whereas some of them ought to have gone out of office; and that thereby, not the plaintiffs only, but the Company were injured. And the bill charged that the Company and its interests would be greatly prejudiced, if the defendants should be permitted to act as directors of the Company in the matters therein mentioned or otherwise. The prayer was to restrain the twelve directors from acting; and that they might be ordered to place the common seal and books of the Company under the control of the lawful directors, for the purposes of the Company. In *Bagshaw v. Eastern Union Railway Company* (b), the distinction is drawn between the two classes of cases.

The short outline of the present case is this:—The corporation invited the plaintiff to subscribe to an undertaking for making 230 miles of railway, of which 30 constituted the portion of the line between Shrewsbury and Stafford. The plaintiff agreed to those terms, and subscribed and paid his money. Then the corporation apply to Parliament,

(a) 1 Ph. 790.

(b) 7 Hare, 114; 2 Mac. & G. 389.

using the partnership name, for liberty to make only the thirty miles, the sum required for which would be actually less than they had in their pockets. They, therefore, keep the plaintiff's money, without giving him what he bargained for. The Act of incorporation enables them to apply to Parliament in the name of all the shareholders, including the plaintiff; but he individually has a right to complain of the fraud which has been practised upon him by the Company, without bringing before the Court any other individual shareholder. The equity is clear. The subscription contract is a several one between each shareholder and the Company; and the plaintiff complains of the whole Company, and not of any shareholders, since it is the Company which threatens to use its corporate power in a manner which will be a fraud upon the contract under which the plaintiff joined it.

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Mr. Bacon in reply.—There might be any number of suits for the same matter, if the plaintiff's argument is right.

[The VICE-CHANCELLOR:—In *Mozley v. Alston* the Lord Chancellor said: "I think therefore, that, if there were no other objection to this bill but the shape and form of it, as filed by one or two shareholders, not on behalf of themselves and others, but in their individual characters only, that objection alone would be fatal to it."]

The case of *Ware v. The Grand Junction Waterworks Company* (a) is conclusive in our favour.

[The VICE-CHANCELLOR:—Since that case was decided, opinions have been given from the bench which had not

(a) 2 Russ. & My. 470.

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then been expressed. I remember that, at that time, it was almost held that a person could not enter into a contract not to apply to Parliament; and it struck me that much might be said in favour of that view.]

His Honour reserved his judgment.

Feb. 7th. The VICE-CHANCELLOR:—

The only cause of demurrer alleged on the record in this case is, want of equity. And I continue of opinion that the bill does state a case for equitable relief.

The very different question, whether it is sufficient in point of parties, is that on which my judgment was reserved.

Mr. Cooper, the plaintiff, sues on his own behalf only; he sues as a shareholder in a certain incorporated Company, in which, however, it must I think be taken, that there are shareholders not parties to the bill, nor represented on the record, unless by the corporation (the body politic) itself, which is a defendant, or by the directors, who are the only other defendants, and are probably shareholders. Now, though there may be many purposes for which all the shareholders in such a Company may and must be considered as effectually represented by the body politic, or by the body politic and directors, yet I am not aware that this rule obtains where (as in the present instance) a complaint is made by an individual shareholder against acts of the body politic, or, in other words, the persons who have the custody and control of its common seal, and manage and direct its affairs; a complaint, namely, that those acts infringe a right not peculiar to the plaintiff, but belonging to him as one of the shareholders, and similarly to other shareholders in that character.

The case before the Court seems to me analogous to that of a trustee for a plurality of persons, who is charged by

one of them with breaches of trust. Generally, in such a case, all must be parties to the cause, or represented in it. And, therefore, assuming that if this suit had been instituted by the actual plaintiff on behalf of all the shareholders, or of all the shareholders not defendants, or if some of the shareholders not directors had been made defendants, the bill would, with or without some further addition, have been sufficient: I think it, in its actual state, not so; a consequence which seems to me to follow from several binding authorities, familiar, in great part at least, to the profession, which are conveniently collected in Mr. Calvert's useful treatise upon the law respecting parties to suits in equity.

On the whole, whatever may be the ordinary course as to costs where a demurrer is allowed for a defect in parties, and that objection is not stated on the record, I think that this demurrer should be allowed without costs on either side, and with liberty to amend generally.

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The bill having been amended, the case now came on upon a motion for an injunction to restrain the defendants from applying to Parliament for an Act authorising them to abandon the formation of a portion of the railways which they were empowered to construct by their present Act; the plaintiff insisting that such an abandonment was contrary to the agreement upon the faith of which he became a shareholder; but that, according to the rules of both Houses of Parliament, he could not be heard to oppose a bill brought in upon the petition of the corporate body of which he was a member.

Feb. 12th.

Mr. *Malins*, Mr. *Roundell Palmer*, and Mr. *Westoby*, in support of the motion, cited *Ward v. Society of Attornies* (a), *Parker v. The River Dunn Navigation Company* (b),

(a) 1 Coll. 370.

(b) 1 De G. & S. 192.

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Bagshaw v. Eastern Union Railway Company (a), Attorney-General v. The Corporation of Norwich (b), and Cohen v. Wilkinson (c).

Mr. Bacon and Mr. Willcock, for the defendants, contended, that the application came too late, the plaintiff having had notice of the intention of the Company as long ago as November, or even September last, and the plans having been deposited in December or January.

The VICE-CHANCELLOR thought that the application came too late, and refused the motion, reserving the costs.

(a) 7 Hare, 114; 2 Mac. & G.
 389.

(b) 16 Sim. 225.
 (c) 1 Mac. & G. 481.

1849.
 Dec. 7th.

SEXTON v. SMITH.

By articles of partnership the business was, at the death of either partner within the partnership term, to be carried on for the residue of the term, for the mutual benefit and at the risk of the surviving partner and the executors or administrators of the deceased partner. After the decease of one partner, tradesmen supplied goods to the firm, and, a decree for the administration of the estate of the deceased partner having been made, they claimed to prove under it for the price of the goods. The claim was rejected:—*Held*, that they had not so elected to proceed in equity as to preclude themselves from suing the executrix at law for the same demand.

THIS was a suit for the administration of a testator's effects, in which the usual decree had been made. A motion was now made on behalf of the plaintiff the executrix, for an injunction to restrain the respondents from suing her at law.

The testator had carried on business in partnership with one William Hammond, under articles, providing that, on the death of either partner, the business should be continued for the mutual benefit and at the mutual risk of the surviving partner and the executors and administrators of the deceased partner until the completion of the term. By the will, the testator directed all monies arising

goods to the firm, and, a decree for the administration of the estate of the deceased partner having been made, they claimed to prove under it for the price of the goods. The claim was rejected:—*Held*, that they had not so elected to proceed in equity as to preclude themselves from suing the executrix at law for the same demand.

from the profits of the business to be invested upon securities in manner therein mentioned.

The testator died on the 26th of July, 1846.

A fiat in bankruptcy was issued against William Hammond on the 5th of June, 1848, under which he was found a bankrupt, and he had not obtained his certificate.

The decree in the suit was made on the 29th of January, 1848, and under it the respondents, William George Watson and George Tyrell, carried in a claim for 25*3*l. 2*s*. 6*d*., alleged to be due to them from the plaintiff as executrix of the testator Henry Sexton.

In support of the claim before the Master, it was contended, that, according to the true construction of the partnership articles, the partnership continued after the death of the testator; and also that the executrix had, subsequently to the death of the testator, acted as partner, and held herself out as partner with William Hammond. On the 18th of July, the claim was disallowed by the Master; and the report, in which the respondents' demand was not included among the testator's debts, had been absolutely confirmed.

On the 20th of November, the respondents commenced an action in the Court of Exchequer against the executrix, to recover the same sum for which the claim before the Master had been carried in.

Mr. Bacon and Mr. *Freeling* in support of the motion. If the plaintiffs at law succeed in recovering against the executrix, she will be entitled to repay herself out of the estate; so that the plaintiffs at law will thus circuitously obtain the same relief as they have, upon a direct application to this jurisdiction, been held not entitled to. By carrying in their claim into the Master's office, they must be considered to have conclusively elected to proceed in equity, and cannot, after failing there, be allowed to prosecute the same demand at law.—They cited *Sutton v. Mash-*

1849.

SEXTON

v.

SMITH.

iter (a), Oldfield v. Cobbett (b), Frank v. Basnett (c), Locke v. Cooke (d).

The VICE-CHANCELLOR, without hearing the other side, said, that the executrix had opposed, and frustrated, the endeavour of the creditors to come in under the decree, and they were now proceeding against the executrix individually at law. His Honour refused the motion, with costs.

(a) 2 Sim. 513.

(c) 2 My. & K. 618.

(b) 5 Beav. 132; 6 Id. 515.

(d) 2 De G. & S. 493.

Dec. 19th.

1850.

Jan. 11th.

Where a bill had been retained for a year, with liberty to bring an action, and it had been ordered, that, if the plaintiff should not proceed to trial within that period, the bill was to stand dismissed, the Court, upon the plaintiff's application, enlarged the time after it had expired, and after the defendant had applied to have that bill dismissed absolutely.

SWANGER v. GARDNER.

THIS was a suit to set aside the purchase of the goodwill of a fishmonger's business at Bath, on the ground of fraud.

The cause came on for hearing on the 13th of November, 1848, and a decree was then made, dismissing the bill with costs as against one defendant, and ordering that, as against another defendant, the bill should be retained for twelve months; and it was ordered, that the plaintiff should be at liberty to bring such action against the defendant Sarah Gardner as he should be advised; or that the plaintiff should be at liberty to continue the action already commenced by him against the said defendant; and in the latter case the defendant by her counsel undertook to consent that the rule to discontinue the action should be set aside, and in either case the plaintiff was to be at liberty to proceed to trial; and it was also ordered, that in case the plaintiff should not proceed to trial as aforesaid, within the time aforesaid, the bill was to stand dismissed out of this Court as against the defendant Sarah Gardner, with costs.

No proceeding was taken by the plaintiff until the 9th

Farina v Silverlock / Beg. & Jones 436.

of November, 1849, on which day he commenced a new action against the defendant Sarah Gardner; and on the same day he caused the writ of summons to be left at the office of her solicitors for an undertaking to appear for the defendant Sarah Gardner to such action, which was given on the following day.

1849.
 SWANGER
 v.
 GARDNER.

On the 16th of November, 1849, an appearance to the action was entered for the defendant Sarah Gardner.

A motion was now made on behalf of the defendant Sarah Gardner, that the bill might stand absolutely dismissed.

In support of the motion the defendant's solicitor deposed, that, by entering the appearance for the defendant before the regular time for doing so, he, the deponent, had afforded an opportunity to the plaintiff to have delivered the declaration in his new action in sufficient time to have enabled him to have proceeded to trial in the Sittings either for Middlesex or London after the then present Michaelmas Term, but that the plaintiff had not yet delivered his declaration in the action.

In opposition to the motion the plaintiff's solicitor deposed, that instructions for the declaration had been long since laid before counsel; but that, owing to the numerous documents which it was necessary for him to peruse, the draft had not been yet settled.

Mr. *Bacon* and Mr. *Toulmin* supported the motion, and cited *Casborne v. Barsham* (a).

Sir *F. Simpkinson* and Mr. *Vance*, for the plaintiff, referred to *Seton on Decrees*, p. 357.

The VICE-CHANCELLOR referred to *Stevens v. Praed* (b), and directed the motion to stand over till the next seal, to

(a) 5 My. & Cr. 113.

(b) 2 Cox, 374.

1850.
 SWANGER
 v.
 GARDNER.

give an opportunity to the plaintiff to make a cross motion to extend the time.

Jan. 11th.

On this day accordingly the motion came on with a cross motion for enlargement of the time.

Mr. Bacon and Mr. Toulmin for the original motion.

Sir F. Simpkinson and Mr. Vance for the cross motion.

The VICE-CHANCELLOR made an order on both motions, enlarging the time till the last day of Hilary Term, the defendant at law undertaking to plead issuably within three days, and the plaintiff to set down the cause within one week afterwards. The defendant to have the costs of the original motion, and those of the other to be costs in the cause. Liberty to apply.

1849.
 Dec. 13th.
 1850.
 Jan. 12th &
 16th.

Plaintiffs by their bill sought, as devisees, to set aside a conveyance executed by the devisor. The defendant, by his answer, admitted that the will (which was made after the Wills Act came into operation) was duly proved in the Ecclesiastical Court. By a slip, evidence was not adduced of the execution of the will:—*Held*, that the defect might be supplied; but that the defendant was entitled to require this to be done by an action of ejectment.

DAVIES v. DAVIES.

THE plaintiffs in this case sought, as the devisees and executors of a testatrix named Catherine Harry (under a will dated the 11th day of May, 1847), to set aside certain conveyances of freehold estates, made by her in favour of the defendant to the plaintiffs. The case alleged by the bill was one of undue influence and insufficiency of advice and protection.

On the cause coming on to be heard, there was no evidence of the execution of the will, except an admission in the answer that the defendant believed that the plaintiffs had duly proved the will in the proper Ecclesiastical

execution of the will:—*Held*, that the defect might be supplied; but that the defendant was entitled to require this to be done by an action of ejectment.

Court. This admission was preceded by a statement in the answer that the defendant did not know, and could not set forth as to his belief or otherwise, whether Catherine Harry duly made and published her last will and testament in writing, or whether or not of the date in the bill mentioned, or of any other date, or whether or not executed and attested as by law required for the validity of a testamentary disposition, or how otherwise, or whether the same was of the purport or effect mentioned in the bill, save that the defendant had been informed that she did make such will as in the bill mentioned.

1849.

DAVIES
v.
DAVIES.

Mr. *Russell* and Mr. *W. M. James*, for the plaintiffs, said that by a slip a wrong will had been proved in the cause; and they submitted that the Court would give leave to the plaintiffs to supply the defect, as was done in *Hood v. Pimm* (a), *Cox v. Allingham* (b), and other cases. In the present case the defendant admitted that the will had been duly proved, and was, therefore, a good will of personalty. Considering that the will was made since the Wills Act came into operation, this admission might be taken as a sufficient foundation for an inquiry.

Mr. *Swanston* and Mr. *Chandless* for the defendant.—The plaintiffs, having brought forward so imperfect a title, or rather no title at all, are not entitled to have an opportunity of adding to the evidence, but can at the utmost ask to have the bill dismissed without prejudice to a new suit: *Marten v. Whichelo* (c), *Holden v. Hearn* (d), *Jope v. Morshead* (e), *Simmons v. Simmons* (f).

[The VICE-CHANCELLOR:—Since the passing of the Wills Act, is not the admission of probate in the answer some-

(a) 4 Sim. 101.

(b) Jac. 337.

(c) Cr. & Ph. 257.

(d) 1 Beav. 445.

(e) 6 Beav. 213.

(f) 6 Hare, 360.

1849.

DAVIES
v.
DAVIES.

thing? I think that in the circumstances of this case the Court ought not to permit the suit to perish. But, should the Court direct an inquiry, or an action of ejectment, or allow an interrogatory?]

The indulgence can only be granted by virtue of a general rule, or with reference to some special circumstances existing in the case. Now, it cannot be said that there is any general rule; and if the Court were to proceed upon the special circumstances of each case, such a course would involve a double hearing of the cause. In *Jope v. Morshead* (a), the Master of the Rolls did not even hold a judgment in ejectment to constitute *prima facie* evidence, so as to enable the Court to grant to the plaintiff an opportunity of supplying the defect in his evidence. [The Vice-Chancellor.—The *prima facie* evidence here relied upon is the defendant's own admission. Does not that distinguish the case?] Not, we submit, effectually, since there is no admission of the validity of the will as a disposition of real estate.

The VICE-CHANCELLOR:—

I think that I may, consistently with *Marten v. Whitchelo* (b), and ought to, allow the execution of the will to be proved. I am ready to hear counsel upon the question which of three modes of investigation that I have suggested should be adopted. At present, I think that it should be in the defendant's option.

Mr. *Swanston* asked for time to consider as to the mode of investigation which the defendant would prefer.

1850.

Jan. 16th.

On this day, Mr. *Swanston* said, that the defendant considered an action of ejectment the most beneficial.

(a) 6 Beav. 213.

(b) Cr. & Ph. 257.

Mr. *Russell* and Mr. *W. M. James* for the plaintiffs.—A defendant is not entitled as of course to have a will proved in an ejectment, except where he is the heir-at-law. In *Lloyd v. Wait* (a), a mortgagor asked for an issue to try the validity of a will; but Lord *Lyndhurst* would not hear of it. There never was such an order made as is now asked, where the question was not between the parties claiming under the deceased, but was as to *jus tertii*.

1850.
 DAVIES
 v.
 DAVIES.

Mr. *Swanston* again submitted, that the defendant's right was to have the bill dismissed.

The VICE-CHANCELLOR:—

I think that the bill ought not now to be dismissed. But, looking to the nature of the case, I think the defendant entitled to elect as to the mode of trial of the fact not yet proved; and as he desires this to be tried, (if at all), in an action of ejectment, I think that, upon his undertaking not to set up any legal impediment, he is entitled to have it so tried. The costs must be reserved.

An action of ejectment was tried, and decided in favour of the plaintiffs; and, on the 8th of July, 1850, the cause came on to be argued, and a decree was made for setting aside all the impeached documents.

(a) 4 My. & Cr. 257.

1850.

Feb. 9th.

DINNING v. HENDERSON.

In paying a creditor who has proved in an administration suit upon a bill of exchange, income tax is deducted from the interest.

THIS was a petition, presented on behalf of the Royal Bank of Scotland, who had proved under the decree for a sum due, in respect of principal and interest, upon a bill of exchange, accepted by the testator in the cause, and which fell due after his decease. The bill was as follows: "Glasgow, 6th March, 1849.—Six months after date pay to me or my order, at my counting-house here, One Thousand Pounds, value received." The Master had deducted a sum in respect of income-tax from the amount payable on account of interest upon the bill, and the petition sought that the Master might review his report in this respect.

Mr. *Lewin* in support of the petition.—Interest in a case like the present is in the nature of damages, and therefore not payable under any contract; it does not therefore come within the meaning of the Income-tax Act. The petitioners would have, if the tax were now deducted, to pay twice over in respect of the same sum. *Holroyd v. Wyatt* (a), *Dawson v. Dawson* (b). Neither in the Courts of common law nor in Bankruptcy is any such deduction made in cases of bills of exchange.

Mr. *Toller*, for the respondents, said that the practice was uniformly in the Masters' offices according to the decision now sought to be reviewed, and had been adopted soon after the passing of the Income-tax Act, with the general concurrence of all the Masters.

The VICE-CHANCELLOR, who, during the argument, sent a communication to the Masters' Office, stated, that both Master *Dowdeswell* and Master *Farrer*, whom his Honour

(a) 1 De G. & S. 125.

(b) 11 Jur. 984.

Bebb v. Bunny 1 Kay V.S. 218.

had consulted, were of opinion that the deduction ought to be made.

1880.
DINNING
v.
HENDERSON.

Mr. *Lewin* in reply.—The practice may be as stated; but, as the question now comes before the Court upon appeal, the Court is bound to decide according to its own construction of the Act of Parliament, as laid down in *Holroyd v. Wyatt*. We should have had greater hesitation in appealing from Sir *George Rose's* decision had not Sir *George Rose* simply followed the practice, and declined to dissent from it unless the Court decided against it. It was indeed in consequence of what passed before the Master, that the appeal was brought.

The VICE-CHANCELLOR:—

The bill of exchange in question was drawn at Glasgow, on the 6th of March, 1839, and was payable six months after date, and no interest was made payable upon the face of it. The bill was accepted by the testator, who died before it became due. It was afterwards dishonoured; and a decree having been made for administering the assets of the testator, the holders of the bill claimed the amount with interest, as creditors of the estate. In such a state of things I should have thought, that, according to the true construction of the Act, the interest should have been allowed to be paid in full, and the claimant left to pay the income tax himself. I learn, however, that in the offices of three of the Masters (the two whom I have mentioned, and the Master whose decision is now in question,) the course has been to deduct the income tax. And there seems reason to believe that the same course has been uniformly pursued in the other offices. It would be too much for me to take upon myself to disturb a practice thus adopted for so many years, whatever my own opinion may be; and I decline doing so.

1850.

Feb. 12th.

ATTORNEY-GENERAL *v.* VINT.

A testatrix gave a legacy to trustees, upon trust, to apply the income to the providing each of the poor inmates of a Poor-law Union Workhouse, above the age of sixty years, with one pint of porter, more or less, according to the number. Upon an information by the Attorney-General, the executors and parties beneficially interested, including infants, not opposing, the Court ordered that the income should be paid to the vicar of the parish constituting the union, to be applied by him according to the will, in a manner consistent with the Poor Law Amendment Act and the orders of the Poor Law Commissioners.

MR. RUSSELL and **Mr. Hallett** appeared in this cause in support of an information by the Attorney-General at the relation of **Mr. Campbell**, one of the guardians of the poor of the Dartford Union, which stated, that **Grace Say**, by a codicil to her will, dated the 21st of May, 1841, made the following bequest:—"I give and bequeath to my trustees aforesaid, 1000*l.*, 3*l.* per cent. Consols, upon trust to pay and apply the dividends to the providing each of the poor inmates of the Dartford Union Workhouse, who shall be above the age of 60 years, with one pint of porter, more or less, according to the number;" and that the testatrix appointed **Mr. Vint** and three other persons her executors, who proved her will. The prayer of the information was, that the legacy might either be ordered to be transferred into or vested in the names of the defendants, or be otherwise properly secured under the direction of the Court, upon the trusts declared by the codicil for the benefit of the poor inmates of the Dartford Union Workhouse, for the time being, above the age of sixty years; and that, if necessary, some scheme might be settled for the application of the past and future dividends for the benefit of the poor inmates.

The defendants by their answer suggested, that the legality of the bequest was questionable, inasmuch as that by the 92nd and 93rd sections of the 4 & 5 Will. 4, c. 76, the Poor Law Amendment Act, the introduction of fermented or any spirituous liquors into any workhouse was forbidden, and it was made an offence to introduce them unless under the directions of the surgeon or the guardians, or in conformity with the rules of the Poor Law Commissioners; and it was alleged, that the rules and directions issued by the Poor Law Commissioners contained no authority to introduce fermented liquors, except under

some medical certificate. It appeared that the executors and such of the persons interested in the residuary estate of the testatrix as were competent to consent, wished that the intention of the testatrix might be carried into execution; but that some of the cestuis que trustent, entitled under the will, were unable to consent. The executors, however, submitted to act as the Court should direct.

Mr. *R. Palmer* and Mr. *G. L. Russell* for the defendants.

THE VICE-CHANCELLOR:—Care must be taken that the law be obeyed, and that no fermented liquors be introduced, except in conformity with the Poor Law Amendment Act. If fermented liquors should be prohibited, the fund may be applied in some manner so as to give the poor old people in the union tea, sugar, and the like. The benefit of this goodnatured bequest ought not to fail.

The order, as ultimately settled, was as follows:—

The costs of all parties prior to the hearing to be paid by the defendants out of the estate of the testatrix, and the costs of the Attorney-General of the hearing to be paid out of the fund; the residue of the fund to be paid into Court and invested, and the income to be paid to the vicar for the time being of the parish of Dartford, to be by him applied pursuant to the provisions of the will, so far as the same may be consistent with the Poor Law Amendment Act; the vicar to give an account once a year, on the first general meeting held after Good Friday, to the vestry of the manner in which the income has been applied. Liberty to apply to the Court in case any difference should arise as to the manner of such application.

1850.
ATT.-GEN.
v.
VINT.

1850.

Feb. 14th.

SMALE v. GRAVES.

The widow and one of the two executors of a surgeon dentist, who alone proved his will very shortly after his decease, by the description of the widow and one of the executors of the deceased, entered into an agreement with a person as his successor, who agreed to give to the widow, her executors, administrators, and assigns 100*l.* yearly for five years, for the goodwill of the business, and for the advantage of an introduction to the patients of the deceased, to pay 100*l.* for the instruments, to take the furniture at a valuation, and to take the house which the deceased held as a yearly tenant, and in which he resided, for the residue of the term therein. The agreement contained stipulations for the personal exertions of the widow on behalf

MR. GRAVES, a surgeon-dentist, was engaged in his profession at his residence in Clare-place, Halifax, of which he was the occupier, under a yearly tenancy at rack rent, up to the time of his decease, on the 11th of December, 1847. By his will, he appointed his wife and Mr. Newton his executrix and executor. Mrs. Graves alone proved the will.

Two days after the decease of Mr. Graves, his widow took on herself to act as executrix, and issued a circular announcing that the executors hoped to be able to make satisfactory arrangements for carrying on the business in connexion with some competent person; but she did not prove her deceased husband's will until after January, 1848.

In the month of December, Mr. Parsons came from Liverpool, and entered into an agreement with Mrs. Graves in the following terms:—

“Memorandum of an agreement made between Mary Graves, of Halifax, widow, and one of the executors of H. S. Graves, late of Halifax aforesaid, surgeon-dentist, of the one part, and J. H. Parsons, of Liverpool, in the county of Lancaster, surgeon-dentist, of the other part: H. S. Graves having lately died, and the said J. H. Parsons being wishful to begin business at Halifax, hereby agrees to give to the said Mary Graves, for the goodwill of the business of her late husband, the sum of 100*l.* per annum for the term of five years, which term to commence on the 1st day of January next; and the said annuity of 100*l.* to be paid by half-yearly instalments, on the 1st day of Jan-

the successor. Upon inquiries before the Master in a creditors' suit against the widow for the administration of the testator's estate, it appeared by the affidavit of the successor, that he relied upon the widow's personal exertions; and that, if these were not afforded, he should resist payment of the annuity. By the report the Master did not charge her with the annuity of 100*l.* as part of her testator's assets; but, on exceptions,—*Held*, that the whole, or a part, of the annuity belonged to the estate; and the cause was referred back to the Master to review his report.

uary and the 1st day of July in each year, during the said term, the first half-yearly payment to be made on the 1st day of July next. The said J. H. Parsons further agrees to pay to the said Mary Graves the sum of 100*l*. for the value of the instruments and stock in trade lately belonging to the said H. S. Graves, and also such sum for the value of the furniture in the house of business of the said H. S. Graves at Halifax, as shall be determined by a competent person, to be selected by the said Mary Graves to value the same; the said sum of 100*l*. and the said value of the furniture to be paid on or before the 1st day of February next; the said annuity of 100*l*. to be secured on the property of the said J. H. Parsons to which he is entitled under his father's will, the expense of which security to be paid by him. A proper deed or assignment, in accordance with these presents, to be drawn up at the joint expense of the parties hereto, and executed by them as soon as the same can be prepared." Mr. Parsons signed this agreement. Mrs. Graves added the following clause to it:—"Agreed to by me, with the understanding, that, in case of my death before the expiration of five years, the annuity to be payable to my heirs, executors, administrators, and assigns," and then signed it.

Mrs. Graves shortly afterwards issued a circular announcing Mr. Parsons as the successor of her late husband, and recommending him as such.

The above memorandum of agreement was subsequently reduced into a more formal document, of which the following contains the only important clauses:—

"Articles of agreement, made, indented, and entered into this 1st day of January, 1848, between Mary Graves, widow, and one of the executors of the last will and testament of H. S. Graves, late of Halifax aforesaid, surgeon-dentist, deceased, of the one part; and J. H. Parsons, of Liverpool, surgeon-dentist, of the other part: Whereas the said H. S. Graves, who died on or about the 11th day of

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December last, during his lifetime and up to his death, carried on and exercised his profession or business of a surgeon-dentist at Halifax, and for that purpose occupied a house situate in Clare-place in Halifax, aforesaid; and whereas the said J. H. Parsons, being desirous of commencing business at Halifax aforesaid as a surgeon-dentist, and of being the successor of the said H. S. Graves, from the advantage that would thereby accrue to him in his business, lately agreed with the said Mary Graves to pay to her, for the goodwill of the said business of the said H. S. Graves, and for the advantage of an introduction to the patients of the said H. S. Graves, the sum of 500*l.*, to be paid by half-yearly instalments of 50*l.* each on the days hereinafter mentioned; and which sum, with any interest due in respect thereof, was agreed should be secured on a sufficient mortgage, to the satisfaction of the said Mary Graves; and that the said J. H. Parsons also agreed with the said Mary Graves to take the surgical instruments and stock in trade of the said H. S. Graves, and also certain articles of furniture in his house of business in Clare-place aforesaid, at a valuation, to be paid for within one month after such valuation, and also would take such house from the 1st day of July instant, for the residue of the term and interest of the said H. S. Graves therein; and that the business in hand at the time of the death of the said H. S. Graves should be completed by the said J. H. Parsons, at his own expense, for the sole benefit of the said Mary Graves; and whereas the said Mary Graves agreed to the terms, and in performance of the said agreement on her part hath introduced the said J. H. Parsons to the patients of the said H. S. Graves, by circulars and advertisements, and hath otherwise used her endeavours to promote the interests of the said J. H. Parsons, and to enable him to succeed in obtaining the business of her late husband, and hath delivered possession of the said house of business, surgical instruments, stock in trade, and articles of furniture to him;

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and whereas the said J. H. Parsons, in part performance of the said agreement on his part, hath taken the said surgical instruments, stock in trade, and articles of furniture at a valuation, and such valuation amounts to the sum of 150*l*.; and whereas the said J. H. Parsons hath given to the said Mary Graves his promissory note under his hand, payable one month after date, for securing the same: Now, therefore, in consideration of the said agreement, and of the said Mary Graves having performed the same on her part, and in further pursuance and performance of the same on the part of the said J. H. Parsons, he the said J. H. Parsons doth hereby covenant" &c. The covenant was to pay the 500*l*. by ten half-yearly instalments, and to take the house in Clare-place for the residue of the term and interest of the testator H. S. Graves or his executors therein, and to pay and to indemnify Mrs. Graves from all claims in respect of the rent and of his succeeding to the business, or on account of Mrs. Graves recommending him to the patients of the said H. S. Graves, or otherwise. Mr. Parsons also agreed, at his own cost, to complete all such business as the deceased testator had in hand at the time of his death; and to pay the amount received for such business to Mrs. Graves, not later than the 1st day of July then next.

A suit having been instituted by a creditor against Mrs. Graves, the usual decree was made for the administration of the testator's estate, with a reference to the Master to take an account of the testator's assets.

In the proceedings before the Master, it was insisted by the plaintiff, that Mrs. Graves was chargeable with the 500*l*., received and to be received for the goodwill of her deceased husband's practice, as assets.

On behalf of Mrs. Graves, it was submitted, that she was personally entitled for her own benefit to the 500*l*. In support of her contention affidavits made by Mr. Parsons,

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and by a clergyman and a merchant of Halifax, were produced; from the two latter of which it appeared, that, on her husband's death, she was left in destitute circumstances; that her husband had been much respected; and that her case had excited great commiseration in Halifax; that there had been a consultation of her friends as to what could be done for her; and that it had been intimated by several of the patients of the testator, that they would be glad to contribute their support to Mrs. Graves, if she could make arrangements, for her own individual and personal benefit, for carrying on the business by means of an assistant, or otherwise; that at first it had been determined that the business should be carried on for her benefit by an assistant; but that it had afterwards been considered more advantageous for her, that the business should be taken absolutely by Mr. Parsons; and that this had been done by him solely for the individual benefit of Mrs. Graves, and not for any benefit to the estate of the testator. Mr. Parsons in his affidavit expressly stated, that he entered into the agreement exclusively under the assurance and belief that Mrs. Graves, in consideration of the annuity of 100*l.* to be paid to her, would and could from her personal influence with the former patients of the testator, induce them to employ Mr. Parsons as successor in his business, and on the understanding that she should continue to reside for a time at or in the immediate neighbourhood of Halifax; and that she should introduce to him such patients; and he added, that the patients employed him on the understanding that Mrs. Graves had secured to herself, for her own exclusive benefit, some advantage from the business carried on by him; and that, in his judgment and belief, should the defendant not be allowed to retain the sums as and when the same shall accrue due according to the agreement, for her own individual benefit, and in consequence should withdraw her influence with her late husband's patients, his business might be very seriously dam-

aged, and that the principal object he had in view for his own benefit in entering into the agreement would be frustrated, or altogether defeated; and that, in such event, it was his intention to resist the fulfilment of his agreement with her for payment of the annuity, and thenceforth to withhold payment thereof.

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The Master thought that Mrs. Graves ought not to be charged with the 500*l.* as assets of the testator, and made his report, charging her with certain sums she admitted that she had received, but not charging her with any part of the annual payments to the amount of 500*l.* agreed to be paid for the goodwill of the business.

The plaintiff excepted to this report, and the cause now came on upon this exception.

Mr. *Russell* and Mr. *Randall* in support of the exception. —The premium received as the purchase of the goodwill of the business of a testator is assets, and ought, in the administration of his estate, to be treated as such. In *Worral v. Hand(a)*, it was proved that the intestate was a publican, and that the defendant, his administratrix, had sold the goodwill. Lord *Kenyon* said, the price of the goodwill was assets in her hands, though she was tenant at will after the death of the intestate; and he added, that, in the Court of Chancery, it was the daily practice to consider all beneficial interests, such as renewable leases and the like, as assets, and to charge the representative with the money arising from them: and that the case before him was analogous to those cases. In *Chisum v. Dewes(b)*, where the unexpired term in a house and the goodwill of a business established in it were sold in a creditor's suit with the consent of the person with whom the lease had been deposited as a security, and brought a sum less than the amount of his debt,

(a) Peake, 74.

(b) 5 Russ. 29.

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the Master of the Rolls observed, that the goodwill of the business was nothing more than an advantage attached to the possession of the house; and that the mortgagee, being entitled to the possession of the house, was entitled to the whole of that advantage, and he could not separate the goodwill from the lease: and the equitable mortgagee by deposit of the lease was held entitled not only to the value of the house, but to the whole sum which the house, with the benefit of the business established in it, produced.

Mr. Bacon and Mr. Toller in support of the Master's report.—The law does not recognise the existence of the goodwill of a profession. It may exist in a trade. The case of *Worral v. Hand* related to a public-house and the trade carried on in it. The distinction is this, that in a trade no reliance is placed on the personal skill of the tradesman, and the value very much depends on locality and other considerations of that kind. But, in a profession, the reliance is placed entirely in the individual, and any recommendation of a professional man made by any person is assumed to be disinterested; at least, the law will not presume that it can be given for a money or other valuable consideration. And on the death of a professional gentleman, his executors have no power of putting any one else in his place capable of valuation.

The decision in the case of *Farr v. Pearce* (a) proceeded upon this principle. The Vice-Chancellor said in that case, "If the general question had arisen here, I think it would have been difficult to maintain, that, where a partnership is formed between professional persons as surgeons and one dies, the other is obliged to give up his business and sell the connection, for the joint benefit of himself and the estate of his deceased partner. When such partnerships deter-

(a) 3 Madd. 78.

mine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and when the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships." And in *Spicer v. James (a)*, a case shortly reported by Mr. Collyer in his work on Partnership, he states that Sir *John Leach* dismissed a bill by creditors of a deceased attorney, for an account of the profits come to the hands of a defendant, who had conducted the business with the consent of the widow, on the ground that the goodwill of an attorney's business was of a personal character, and that it could not form assets in an administration suit. It seems that the entry of the decree in the Registrar's book does not contain any direction for the dismissal of the bill against any parties; yet Mr. Collyer's note of the case is certainly accurate as to what Sir *John Leach* said. In the present case, it appears on the affidavits, that what Mr. Parsons purchased was not the goodwill of the testator's business, but the benefit of Mrs. Graves' individual exertions to bring him patients, aided by the sympathy felt for Mrs. Graves as a deserving person in unfortunate circumstances. If these have produced value in money, it forms no part of the testator's estate, and the exceptions to the Master's report must be disallowed.

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The VICE-CHANCELLOR:—

Whether any complaint could have been made against the defendant Mrs. Graves, if she had done nothing with respect to this business, I need not say. With deference to the Master, I am of opinion that either the whole or a part of the 500*l.* must be considered as belonging to the estate of the testator; and that the report should be reviewed, with a declaration to that effect. If the Master shall allow the defendant something, I shall be disposed

(a) Coll. on Partn. 104.

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probably to agree with him as to the amount that he may fix; but I am unable to accede to the proposition, that no part belongs to the testator's estate.

Fee. 15th.

REEVE v. REEVE.

A testator had, before his marriage, limited lands to trustees for a term, to secure a debt, and subject thereto to other trustees for another term, to secure an annuity of 100*l.* per annum to his intended wife for life, with a proviso for determining the latter term, on his investing a sufficient amount to secure an equal annuity. He died without having made such an investment, having by his will directed payment out of his personal estate of his debts, including what might be charged upon the settled lands; and he bequeathed his residuary estate to his widow. Before his death, he had paid off the debt secured by the first of the above mentioned terms, which had consequently determined, and the annuity was the only charge upon the estates:—*Held*, that the tenant of the estates was not entitled to have them exonerated as against the widow out of the residue.

BY indentures of lease and release, dated the 30th and 31st of May, 1832, the release being made between Charles Reeve of the first part, the defendant Sarah Wells Reeve, by her then name of Sarah Wells Fitzjohn, spinster, of the second part, Germain Lavie of the third part, Richard Smith of the fourth part, Cornelius Pateman Herbert and Richard Hancock of the fifth part, and Robert Fitzjohn of the sixth part; being a settlement made in contemplation of a marriage shortly afterwards solemnised between Charles Reeve and Sarah Wells Fitzjohn—certain lands and hereditaments in Carlton and Faceby in Yorkshire were limited to trustees for 500 years, upon trusts for raising and paying to Richard Hancock a debt of 2500*l.* and interest, and subject thereto to the use of Robert Fitzjohn, his executors, administrators, and assigns, for 200 years, upon trust to raise the annual sum of 100*l.*, clear of all deductions, and, during the joint lives of the said Charles Reeve and Sarah Wells Fitzjohn, to pay the same to the latter for her sole and separate use; and, after the decease of Charles Reeve, to pay the same unto the said Sarah Wells Fitzjohn and her assigns, during her life, in lieu of dower; and it was thereby declared, that, if Charles Reeve or his assigns should, at any time, to the satisfaction of Robert Fitzjohn, his executors, administrators, and assigns, invest in the Parliamentary stocks or public funds of Great Britain, in

the name or names of him or them, the said Robert Fitzjohn, his executors, administrators, or assigns, a sum of money, the annual produce whereof, when so invested, should be not less than the sum of 100*l.*, and should declare, by some deeds or deed, to be signed and sealed by the said defendant Robert Fitzjohn, his executors, administrators, or assigns, that the said sum, and the annual produce thereof, should be held upon and for such trusts, intents, and purposes, and with such powers of changing the securities and other usual powers as, regard being had to the difference in the nature and quality thereof, would best or most nearly correspond with and effectuate the trusts, intents, and purposes thereinbefore declared concerning the hereditaments and premises comprised in the said term of 200 years, and the rents, issues, and profits thereof, for the benefit of the said Sarah Wells Fitzjohn, then and in such case the said annuity or yearly sum of 100*l.* should no longer be a charge on the said hereditaments and premises, but should wholly cease and be void; and that, when the trust of the said term of 200 years should be performed, the said term of 200 years should wholly cease and determine.

Charles Reeve died without ever having invested any sum in pursuance of the above proviso. By his will, dated the 26th of January, 1846, after directing that his funeral and testamentary expenses and all his just debts, including (if anything) what might at the time of his decease be charged on his estates in Carlton and Faceby, should be paid out of his general personal estate, he devised the estates in Carlton and Faceby, in the event of his sons dying under age without leaving issue, to his wife Sarah Wells Reeve, for her life; and he bequeathed unto his wife, her heirs, executors, and administrators, for her and their absolute use and benefit, all his furniture and household effects, plate, linen, china,

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glass, books, prints, and paintings, not being heir-looms, and all his watches, trinkets, horses, carriages, harness, wines, liquors, and provisions, and also all policies of assurance, bonuses, and other benefits to arise or be derived therefrom, which might belong to him at his decease, or become payable to his executors in consequence thereof; and also all other his estate and effects, real and personal, and whether in possession, reversion, or expectancy; and he appointed his wife and Robert Fitzjohn executrix and executor of his will.

At the time of the execution of the will the testator's estates in Carlton and Faceby continued to be subject to the term of 500 years, created by the settlement, to secure the debt of 2500*l.* due to Richard Hancock; but this debt was paid off, and the term had thereupon ceased in the lifetime of the testator, so that the annuity of 100*l.* limited to the widow by the settlement was, at his death, the only charge on the lands in Carlton and Faceby.

This was a suit instituted by the eldest son of the testator, who was the tenant for life of the lands in Carlton and Faceby under the settlement, for a declaration that the annuity of 100*l.* per annum, limited to the widow by the settlement, was satisfied by the residuary bequest to her, which was of much greater annual value; or that, at all events, under the direction for payment of the testator's debts, including whatever might be charged on his estates in Carlton and Faceby, a sufficient sum to satisfy the annuity ought to be set apart out of the residue.

Mr. *Wigram* and Mr. *Selwyn* for the plaintiff.—The expression "including whatever may be charged upon my estates in Carlton and Faceby," shews that the testator meant to use the word debts in a more extensive sense than that which strictly belongs to it, otherwise, the parenthesis would have been superfluous; and as the will

must now be taken to speak at the death, and there was no actual debt charged upon the estates referred to, the annuity must fall within the direction.—They cited *Stillman v. Weedon* (a).

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Mr. *Russell* and Mr. *Pryor*, for the widow, were not called upon.

The VICE-CHANCELLOR said, that the language of the will appeared to be adverse to the argument addressed to the Court for the plaintiff. His Honour thought that the will did not render it incumbent on the executor and executrix to make the investment contended for on behalf of the plaintiff; but that the widow was entitled both to the charge and the residue. The bill was dismissed without costs.

(a) 16 Sim. 26.

VINCENT v. GODSON.

Feb. 8th.

THIS was a motion after a decree in a creditor's suit, to restrain a creditor from proceeding at law upon a judgment.

Mr. Richard Godson, the testator in the cause, died on the 1st of August, 1849, having made his will, and appointed Mr. William Bulkeley Hughes his executor, who proved the will.

On the 16th of November, 1849, Miss. Barbara Maria Best, a bond creditor of the testator, commenced an action against the executor to recover 4000*l.* due to her upon her bond.

On the 23rd of November, Mr. George Vincent, another creditor, filed the bill in the present cause on behalf of

Where a creditor of a testator obtained judgment against the executor de bonis testatoris, and a decree was immediately afterwards made in a creditor's suit:—*Held*, that the executor was not entitled to an injunction to stay execution on the judgment.

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himself and all other the creditors of the testator, for the usual administration decree.

In order to gain time to obtain a decree in the suit before Miss Best could obtain judgment in her action, the executor's solicitor, on the 6th of December, 1849, cravedoyer of the bond, the practice of the Courts of law being, that a defendant's time to plead does not run in the interval between the craving and granting of oyer; and that a defendant has as much time to plead after oyer given, as he had at the time of the demand thereof.

On the 27th of December, the executor, being under terms to plead issuably, delivered five pleas to the action: First, non est factum; Secondly, that the testator was never indebted; Thirdly, plene administravit; Fourthly, that the bond was deposited as an escrow with certain persons therein named; And fifthly, that the bond was given subject to a condition, which had been performed.

The plaintiff in the action, being advised that one of the pleas was not issuable, signed judgment for 10,000*l.* on the 29th of December.

On the 31st of December, the executor's attorney took out a summons before a Judge at Chambers to set aside the judgment for irregularity.

On the 3rd of January, 1850, the summons was discharged; but the Judge restrained the plaintiff at law from taking any further proceedings on the judgment until the third day of the then ensuing Hilary Term, to afford the defendant an opportunity of taking the opinion of the Court on the validity of the judgment. The material parts of the record at law were as follows:—"Whereby, and by reason of the non-payment thereof, an action hath accrued to the plaintiff to demand and have the same of and from the defendant as such executor as aforesaid; yet the said Richard Godson deceased, in his lifetime, and the defendant as executor as aforesaid since the decease of the said Richard Godson, have not nor has either of them paid the said sum

above demanded, or any part thereof, to the plaintiff's damage of five hundred pounds; and thereupon she brings suit, &c. And, on the 29th day of December, in the year of our Lord, 1849, the defendant, by Robert Vaughan Wynne Williams, his attorney, says nothing in bar or preclusion of the said action of the said Barbara Maria Best, whereby the said Barbara Maria Best remains therein undefended against the said William Bulkely Hughes; and hereupon the plaintiff freely here in Court remits to the defendant all damages which she hath sustained, as well on the occasion of the detention of the said debt as for her costs and charges by her about her suit in this behalf expended: Therefore it is considered, that the plaintiff do recover against the defendant, as executor as aforesaid, her said debt, to be levied of the goods and chattels which were of the said Richard C. Godson at the time of his death in the hands of the defendant as executor as aforesaid to be administered, if he hath so much thereof in his hands to be administered."

On the 12th of January, 1850, the usual decree for administration was made in the suit; and on the 14th, notice of it was served upon the attorneys of the plaintiff in the action.

On the 16th of January the Court of Exchequer granted a rule to shew cause why the judgment should not be set aside, and the executor be at liberty to plead plene administravit, or plene administravit præter, as he should be advised.

The rule nisi came on to be argued on the 22nd of January, and was ordered to stand over till the 24th; when an order was made, that, in the event of 1592*l* not being paid into Court, the rule of the 15th of January should be discharged.

The rule was afterwards discharged, and a motion to stay execution upon the judgment now came on to be heard.

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Mr. *Swanston*, Mr. *Goodeve*, and Mr. *Jones*, in support of the motion.—In *Clarke v. Lord Ormond* (a), Lord *Eldon* said: “Ever since the case of *Morice v. Bank of England* (b) it has been the settled doctrine of the Court, that, where a decree has been obtained for payment of creditors, it is a judgment for all; and the Court will not permit any particular creditor, by proceeding at law, to disturb that administration of the assets which this Court, in the execution of that judgment for all the creditors, will decree; and the Court not being in the habit of taking the word of any one as to the amount of the assets or debts till it has a report finding what they are, and considering that equal justice must be done to all, will not in the meantime allow any to touch the assets. *Even if the creditor has got a judgment before the decree*, though he may come in and prove as such, he must not take out execution. There are, I understand, two creditors here, one for goods sold and delivered, and another for funeral expenses; if they have obtained judgments by which the executors are personally liable *de bonis propriis*, I have nothing to do with it; but if they are judgments *de bonis testatoris*, it certainly would be a case for an injunction.” And in a case of *Egan v. Baldwin* (c), where the decree was after the judgment, Sir *W. M'Mahon* granted an injunction, and said: “By the decree this Court has taken possession of the assets of the testator, and deprived the executor of all control over them. The Court, therefore, cannot permit him to be sent to gaol for not paying out of assets which are to be administered here. The form of the judgment is of no consequence, nor whether it was before or after the decree. The only question is, whether it is sought to be enforced after the Court is by the decree in possession of the assets. If the Court is in possession, it will restrain and send him,

(a) Jac. 123.

(b) Cas. temp. Talb. 217; 4 Bro. P. C. 287.

(c) 2 Molloy, 532; 1 Hogan, 190.

after notice of the decree into the office (by injunction against his law proceedings) against the testator's assets, but the creditor generally is entitled to the costs of the motion to stop him." The question in each case has been, whether the judgment, which the creditor has obtained or become entitled to at law, was against the assets or against the executor personally. If it is against the assets, as it is here, the injunction is granted. In *Drewry v. Thacker (a)*, where the whole law upon the subject is fully discussed by Lord *Eldon*, the judgment had been obtained before the decree, and execution had even issued. In that case Sir *Thomas Plumer* had not only restrained further proceedings, but had ordered the plaintiffs at law to sign an authority for the sheriff to re-deliver the goods seized to the executrix. And it does not appear that this order was substantially varied, for Lord *Eldon* concludes his judgment by saying: "I cannot, therefore, at this moment assent to the notion that this order can in all respects remain, and I will not undertake to say that this case is very easy of solution, putting all these difficulties out of view; but where the case at law affords an ulterior resort against the bona propria of the representative, if this Court is so to arrange its proceedings as to take care that while it destroys one remedy it does not affect the other, it seems to me that a course must be adopted somewhat different from that of the present order."

It is true, that in *Lee v. Park (b)*, Lord *Langdale* refused to restrain a creditor, who had obtained judgment before the decree; but it is evident, from the stress laid by his Lordship upon the particular and special facts of the case, that the decision proceeded on these particular facts, and was not intended to lay down, as a general rule, that a creditor, who has obtained judgment de bonis testatoris before the decree, cannot be restrained from proceeding.

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(a) 3 Swanst. 529.

(b) 1 Keen, 714.

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That proposition will be advanced for the first time by the creditor in this case.—They also referred to *Terrewest v. Featherby* (a), *Lord v. Wormleighton* (b), *Kirby v. Barton* (c), *Perry v. Phelps* (d), *Vernon v. Thellusson* (e), *Rouse v. Jones* (f), *Paxton v. Douglas* (g), *Fielden v. Fielden* (h), *Morice v. Bank of England* (i), *Ranken v. Harwood* (k), *Kent v. Pickering* (l), *Price v. Evans* (m), and *Egan v. Baldwin* (n).

Mr. Malins and Mr. Greene for the creditor.—It must be admitted that there has been much misapprehension as to the effect of such a judgment as has been obtained in this case; but recent cases, and the observations of Mr. Justice Williams in his Treatise on Executors (o), have removed this misapprehension; and it is now well understood, that, although such a judgment as the respondent has obtained is in terms de bonis testatoris only, yet that it fixes the executor with an admission of assets; and that, after an ineffectual or insufficient levy upon the testator's goods, the creditor would be able to obtain payment of the part of his debt which is not satisfied by the goods of the testator, from the executor personally, either by scire fieri or an action of devastavit. Any dicta, therefore, of equity Judges, founded upon the suppositions that such a judgment affects only the remedy against the testator's assets, and that, by restraining the creditor from enforcing it, the Court does not deprive him of his personal remedy, must be taken to have proceeded upon an erroneous hypothesis, and not to lay down the law of the Court. As regards actual decisions, of all the cases cited on the other side, *Egan v. Baldwin* is the only one, where

- (a) 2 Mer. 480.
- (b) Jac. 148.
- (c) 8 Beav. 45.
- (d) 10 Ves. 34.
- (e) 1 Ph. 466.
- (f) 1 Ph. 462.
- (g) 8 Ves. 520.

- (h) 1 S. & S. 255.
- (i) Cas. temp. Talb. 217.
- (k) 5 Hare, 215.
- (l) 5 Sim. 569.
- (m) 4 Sim. 514.
- (n) 1 Hogan, 196; 2 Molloy, 532.
- (o) Page 1633, 4th edit.

a Court of equity deprived a judgment creditor of his priority. Now the authorities referred to in that case are *Paxton v. Douglas* (a) and *Fielden v. Fielden* (b). In neither of these cases, however, does it appear that the creditor had obtained judgment; indeed, in the latter, it appears upon the report, that the action was commenced after the decree. *Egan v. Baldwin* cannot, therefore, be regarded as of any authority. [The *Vice-Chancellor*.—It is the decision of Sir W. M'Mahon, an eminent lawyer.] In *Kirby v. Barton* (c), and *Price v. Evans* (d), the decree was before the judgment, and the same may have probably been the case in *Kent v. Pickering* (e), though the report does not shew how this was. With regard to *Drewry v. Thacker* (f), it is impossible to read Lord Eldon's observations in that case, and not to arrive at the conclusion that he disapproved of any interference with the priority and the legal rights of a creditor, who, by his diligence, had obtained judgment before the decree. [The *Vice-Chancellor*.—What Lord Eldon discusses in that case is, the difficulty or impossibility of affording protection to the assets, and at the same time of avoiding injustice to the creditor in respect of his remedies arising out of the executor's personal liability.] In *Lee v. Park* (g), where the judgment preceded the decree, the injunction was refused. It is impossible to sever the remedies against the executor from the right against the assets, because, practically, execution must first issue against the assets. It is a necessary preliminary step to obtain the Sheriff's return of nulla bona. Mr. Justice Williams has conclusively shewn in his *Treatise on Executors* (h), that the middle course attempted to be taken in *Kent v. Pickering* (i), and

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(a) 8 Ves. 520.

(b) 1 S. & S. 255.

(c) 8 Beav. 45.

(d) 4 Sim. 514.

(e) 5 Sim. 569.

(f) 1 Keen, 714.

(g) 3 Swanst. 529.

(h) Page 1633, 4th edit.

(i) 4 Sim. 514.

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Price v. Evans (a), of restraining execution against the assets, and leaving the creditors to proceed against the executor personally, is impracticable, and arose from a misapprehension of the practice at law, which even Lord *Eldon* admitted that he had misunderstood: *Lord v. Wormleighton* (b). [The *Vice-Chancellor*.—After Lord *Eldon*'s declaration in that case, it may be respectfully said, that many orders have been made in this Court without a sufficiently accurate attention to the forms of procedure at law.] The rule is, that the decree is only to be preferred, if it precede the judgment in point of time. In *Largan v. Bowen* (c), Lord *Redesdale* said, "There the creditor brought an action at law against the executor; if he could prosecute that action with effect, and become a judgment creditor before the decree, he would have a priority against the personal assets." It is not possible under the decree to place the creditor in the same position in which he now stands: suppose the executor confessed a judgment, or suppose there to be creditors who obtained judgments against the testator in his lifetime, at law, the present creditor would have priority over these if he gets execution before them.—They also cited *Martin v. Martin* (d), and *Goate v. Fryer* (e).

Mr. *Russell* and Mr. *C. Hall* were for the plaintiff in the suit.

Mr. *Swanston* in reply.—If the question were before the Court for the first time, there would be no difficulty in dealing with it. It would then be clear, that, upon general principles, this Court is the proper tribunal for the administration of the testator's assets. The fund to

(a) 4 Sim. 514.

(b) Jac. 148.

(c) 1 Sch. & Lef. 299.

(d) 1 Ves. sen. 211.

(e) 2 Cox, 201.

be distributed is untouched by the judgment at law: *Morrice v. Bank of England* (a). *Martin v. Martin*, referred to on the other side, was decided during the transition state of the jurisdiction, while passing from the practice of granting a particular to that of making a general decree. [The *Vice-Chancellor*.—According to your theory, when is the plaintiff at law to avail himself of the rights which he has acquired against the executor personally?] When the insufficiency of the assets of the testator for payment of the debt is ascertained in the course of their administration in this Court. [The *Vice-Chancellor*.—Are you prepared to pay the whole amount into Court at once?] We will pay into Court the balance in our hands. The question is between this creditor and the others. Is the decree to be treated as a nullity, and is the executor to pay this demand in full out of the assets? That is really the question at issue. There cannot be two administrations, one here and another at law. In *Drewry v. Thacker*, Sir Thomas Plumer had arranged the details of a decree, upon the supposition of an eventual personal liability of the executor. It is not for me to say whether, in the circumstances of that case, such a decree might not have been just, for the administratrix there had been party to a compromise. Whatever the executor has to pay in respect of this debt he will be entitled to retain out of the assets of the testator. Therefore, this is clearly a question only between this creditor and the others; and whatever may be the rights of the respondent she must enforce them in this Court. At one time an effort was made to give jurisdiction to Courts of law in such cases, and the observations of Mr. Justice Lawrence in *Tolput v. Wells* (b) illustrates strongly the difficulties attending such an attempt.

THE VICE-CHANCELLOR:—

I had hoped that the progress of the argument would

(a) Cas. temp. Talb. 217.

(b) 1 M. & Selw. 395.

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change the opinion which, upon reading last night some of the authorities cited, I formed upon this motion; but it has not done so: and it seems to me better for both parties not to postpone my decision.

During a part of the early stage of the discussion, the effect as well as the form of the judgment at law, that has been obtained against the executor, had been, I think, mistaken by me; for which, if an apology were requisite, it would perhaps be afforded by the cases of *Terrewest v. Featherby* (a), and *Lord v. Wormleighton* (b), and what is said in page 543 of the report of *Drewry v. Thacker* (c), a report that records many remarks of Lord Eldon deserving most particular attention. My present impression is, (and indeed some at least of the executor's counsel have admitted), that at law the judgment concludes the executor upon the question of assets between him and the plaintiff at law, that is to say, fixes him as between himself and the plaintiff, with an admission of assets.

This judgment, a final judgment as I understand it, having been obtained and completed, though after the filing of the bill yet before the decree, I do not see any sufficient ground, in point of precedent or in reason or justice, for depriving the creditor of the benefit of it. How the matter would have stood if the decree had been earlier than the judgment, or if the judgment had been a different kind of judgment, it is not, I think, necessary at present to consider. But the judgment, being as it is, and having preceded the decree, may (independently of any personal liability at law brought by the judgment upon the defendant at law) have the effect of placing the plaintiff at law in this Court above all the other creditors; for it has not been asserted that any other judgment has been obtained against the executor, nor has it been alleged that there is any unsatisfied judgment which was recovered against the testator in his lifetime. It

(a) 2 Mer. 480.

(b) Jac. 148.

(c) 3 Swanst. 529.

is, however, I agree, to be considered as possible that judgments of the latter description may yet appear. If any such shall appear, what will be the respective positions, with regard to them, of the persons holding them, and of Miss Best and the executor? That question it may never be, and certainly I think it is not now, necessary to answer. For, however it ought to be answered, and whether the assets are deficient or not deficient, considering what has been said by Lord *Eldon* in *Drewry v. Thacker* (a), though not forgetting the other dicta and authorities cited, (especially the dicta in *Clarke v. Lord Ormond* (b) and *Vernon v. Thelluson* (c), the correctness of which, properly understood, and properly applied, seems unquestionable), it appears to me that the difficulties in the way of interfering in the executor's favour on this motion are, with regard to his personal liability, and (on that, if on no other ground) with regard to the assets, insurmountable; and I must therefore refuse it.

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(a) 3 Swanst. 529.

(b) 1 Ph. 466.

(c) Jac. 123.

HUTCHINSON v. NEWARK.

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THIS was the suit of infant next of kin for the administration of the estate of an intestate named Bury Hutchinson. The defendants were the intestate's widow (who was his administratrix, and had married again), Mr. Newark (her husband), and other defendants.

A motion was now made on behalf of the administratrix and her husband, to restrain Mr. George Basham from acting as solicitor to the next friend of the infant plaintiffs in the suit, on the ground that he had acted as solicitor to Mrs. Newark.

The Court refused to restrain, at the instance of an administratrix, a solicitor who had acted on behalf of the administratrix in the affairs of her intestate's estate, from acting as the solicitor of some of the next of kin in a suit for the administration of the estate.

Mr. *Russell* and Mr. *Daniel*, in support of the motion,

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cited *Davies v. Clough* (a). [The *Vice-Chancellor*.—Will not the solicitor's bill against Mr. Newark be paid out of the assets?] Possibly; but at all events Mr. Newark is liable to the solicitor. Mrs. Newark was his client, and she has a right to have her confidential communications with her solicitor protected by the injunction sought.

Mr. *Malins* and Mr. *W. D. Evans*, for the respondents, referred, in the course of the discussion, to *Parratt v. Parratt* (b).

The VICE-CHANCELLOR:—

My opinion is, that the principle laid down in *Cholmondeley v. Clinton* (c) does not apply to this case. I think that there is no ground upon which the Court ought to interfere to prevent this gentleman from communicating to the next of kin what took place between him and the administratrix in the course of the administration of the estate. I consider this to be the right conclusion in the present instance, though assenting, as I do entirely, to *Lord Cholmondeley's case*.

The motion was refused, without costs.

(a) 8 Sim. 262.

(b) 2 De G. & S. 259.

(c) 19 Ves. 261.

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INMAN v. WEARING.

Feb. 18th.

THESE were two demurrers to a bill filed by the Rev. James W. Inman, one of the executors of Robert Inman, deceased, who was a mortgagee of three distinct estates, each of which was subject to a distinct first mortgage.

The three several estates were called respectively the Millthorpe estate, the Akay estate, and the Hollings estate.

The mortgage to the plaintiff's testator was created by deeds of the 17th and 18th of March, 1841.

The first mortgage on the Millthorpe estate became vested in the defendant Wearing, who was alleged by the bill to have been in possession, and to have sold that estate. The first mortgage on the Akay estate became vested in John Edward Norris, John Stanley, William Henry Rawson, Charles Milne, and William John Norris, who were also defendants; and they were alleged by the bill to have taken possession, and to have sold to the defendant William Inman, who, with another defendant, named Anne Inman, were the co-executors of the plaintiff. The first mortgage on the Hollings estate became vested in another defendant, named Thomas Christopher Burrill; who was alleged to have entered into possession, but not to have sold any part of that estate.

The prayer was for an account of what was due for principal and interest to the defendants, the prior mortgagees, on their several mortgages, and to the plaintiff and the defendants, William Inman and Anne Inman, as the executors of Robert Inman, under the indentures of mortgage, dated the 17th and 18th of March, 1841; and for an account of all sums of money possessed and received by the prior mortgagees in respect of the rents and profits of the said several estates so mortgaged to them respectively as aforesaid, or which, but for their respective wilful default, they might have received; and that an account

A bill was filed by a second mortgagee of three estates (each of which was subject to a distinct prior mortgage) for a foreclosure against the mortgagor, and an account against the prior mortgagees. The bill also sought to impeach a sale made by one of the prior mortgagees as an improvident one. It did not seek or offer to redeem the prior incumbrances:—*Held*, that the bill was not multifarious, but was demurrable, on the ground that it contained no offer to redeem.

Knight v. Bowyer 2 H. & L. 447.

Hughes v. Cook 34 Beav. 410

Marshall v. Knewsham 2 R. 10th. 252

Robt. Bk. & Australia v. United & Co. 4 Ch. Cas. 400

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might also be taken of the produce of the sales of the Millthorpe estate and of the Akay estate, or which, but for their respective wilful default they might respectively have received in respect of the produce of such sales; and that, in taking the account of the monies received, or which ought to have been so received, for or in respect of the Akay estate, the defendants, who had sold the same, might be charged with such further sum as they ought to have received for the sale beyond the sum of 2500*l.*, in case the estates had been sold by them with due prudence and precaution; and that the defendants might be respectively decreed to pay what should be found due from them respectively on taking the aforesaid accounts; and, if it should appear, on taking the aforesaid accounts of the produce of the sales of the Millthorpe estate and of the Akay estate, that any parts of the purchase-monies of the respective estates had not been received by the defendants Thomas Wearing, John Staveley, William Henry Rawson the younger, Charles Milne, William John Norris, and James Edward Norris respectively, that proper inquiries might be directed, to ascertain under what circumstances the purchase-monies had not been received; and that proper directions might be given for completing the sales; and that the surplus of such respective purchase-monies, after payment of what should be found due to the said last-named defendants respectively on their aforesaid sales, might be applied towards satisfaction of what was due to the plaintiff and defendants, Anne Inman and William Inman, as such executors as aforesaid, under the indentures of mortgage, dated the 17th and 18th of March, 1841; and that the remainder of the property comprised in the indenture, dated the 18th of March, 1841, might be sold, and that the proceeds of such sale or sales might be applied in payment of what was due to the plaintiff and the defendants, Anne Inman and William Inman, as aforesaid; and that the surplus, if any, of such proceeds might be applied according to the rights of the parties under the respective

indentures of mortgage aforesaid. But the bill did not seek or offer to redeem the prior mortgages.

To this bill the defendants, who had the prior mortgages on the Akay and Hollings estates, respectively demurred for want of equity and multifariousness. The demurrers were argued together.

Mr. *Malins* and Mr. *Sidney Smith* in support of one, and Mr. *Swanston* and Mr. *Robson* in support of another demurrer.—The mortgagor could not himself have comprehended in one suit the redemption of three distinct mortgages. Nor could a purchaser of the equity of redemption. How then can a second mortgagee? A mortgage would be a very bad security if the mortgagor could, after making it, so implicate the equity of redemption with that of other distinct property, that, in any proceedings respecting the mortgage, all the parties interested in the other property must be brought before the Court. If it be said, that there must be inconvenience on one side or the other, surely the mortgagor and the puisne incumbrancers who choose to advance their money, knowing of the rights of the prior mortgagee, are the persons who ought to suffer it. —[They cited *Brooks v. Lord Whitworth* (a), *Salvidge v. Hyde* (b), *Pearse v. Hewitt* (c), *Attorney-General v. Goldsmiths' Company* (d), *Attorney-General v. Cradock* (e). They also commented on and distinguished *Campbell v. Mackay* (f).] Even if the bill were not multifarious it must fail for want of equity, for it does not pray for redemption against the demurring defendants: *Dalton v. Hayter* (g).

The VICE-CHANCELLOR:—

With regard to multifariousness, the case is shortly thus:

- (a) 1 Madd. 86.
- (b) 5 Madd. 138.
- (c) 7 Sim. 471.
- (d) 5 Sim. 670.

- (e) 3 My. & Cr. 85.
- (f) 1 My. & Cr. 603.
- (g) 7 Beav. 313.

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—The plaintiff holds one entire security upon several estates belonging to a person named Upton, who is the owner of all of them. When he created the plaintiff's security, the property was subject to different charges affecting different parts of it, in favour of different incumbrancers. In order to discuss the question of multifariousness, the existence of the equity must be assumed. Assuming the existence of an equity, the right as between the plaintiff and his mortgagor is a single right, to the discussion of which other persons having different interests are necessary or proper parties. The subject of multifariousness has, I think, never been better and more satisfactorily discussed or illustrated than it has been of late years. I particularly refer to two cases before the Lord Chancellor, one of which came before the House of Lords, in the presence of the present Lord Chancellor, in the interval between his two Chancellorships. One is *Campbell v. Mackay* (a), and the other *Attorney-General v. Corporation of Poole* (b). The latter case came before the House of Lords, and is reported under the name of *Parr v. Attorney-General* (c). Upon that occasion, after Lord *Lyndhurst* and another peer had spoken, the Lord Chancellor said:—"Now, nothing can be more difficult than to lay down rules as to multifariousness. As cases necessarily come before the Court in various shapes, many matters are to be considered before a rule can be laid down applicable to all cases; because, however important it is to prevent one defendant from being exposed to the expense of litigation, where it appears that he is only interested in part of it; yet, if that rule were to be strictly adhered to, it would frequently become impossible to agitate the whole case, when some one defendant was interested only in part of it. That was brought under the consideration of Sir *John Leach*, who laid down no general rule; but, with the abili-

(a) 1 Myl. & Cr. 603.

(b) 4 Myl. & Cr. 17.

(c) 8 C. & F. 409.

ty which belonged to him probably more than to any other Judge, of stating with great precision the grounds upon which he conceived a particular rule ought to be adopted, in the case referred to (a), he puts it upon this, that if the case be an entire case as against one defendant, no other defendant then has a right to complain, although he is connected only with some portion of the whole case. The consequence of adopting a different rule would obviously be, that, in order to prevent an objection for multifariousness, you must split an entire case." Concurring entirely in these observations, I think that they apply to the present case.

The question of want of equity remains. Now the recollection of the Registrar Mr. *Colville*, sen., agrees with mine in this, that a decree for redemption is not prefaced by mentioning any submission to redeem. In a case not wholly wanting in analogy to the present, a bill for an account, I believe that, although a decree in a case where the plaintiff ought himself to account, in order to effect complete justice, is always prefaced by a submission to account, yet a bill cannot be demurred to for want of such a submission. For these reasons, among others, I should have thought, upon principle, that, if the bill had stated a case in which redemption, either wholly or in part, was requisite or proper, a demurrer ought not to be allowed, because redemption is not asked, especially as a decree for redemption does not make it compulsory upon the plaintiff ever to pay or to redeem, but merely gives him the alternative of paying or of losing the right of redemption. If, therefore, the case had rested on principle, or on my own recollection of the law, I should not have allowed the demurrers on this ground. But the authority of a dictum of a Judge of great learning and experience has been produced, and I cannot decline to pay attention to it. I find Lord *Langdale*,

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(a) *Turner v. Robinson*, 1 S. & S. 313.

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in *Dalton v. Hayter*, thus expressing himself (a):—"Now, to this bill there is a demurrer for want of equity; and the first ground of demurrer is, 'I am a mortgagee on the Shanks estate, and you do not offer to redeem me.' If the question in this cause related to the Shanks estate, I should say that this was a decisive answer to this bill; for I take it to be settled, that the owner of the equity of redemption cannot make a mortgagee a party to any suit in this Court without offering to redeem him." And then, a little further on, there is this passage:—"Mr. Wood has very properly admitted that a mortgagor cannot make a mortgagee a party in respect of his mortgage estate without offering to redeem him." In opposition to this dictum, can I hold this bill sufficient? On that point alone I wish to hear the plaintiff's counsel.

Mr. *Russell* and Mr. *Piggott*, for the plaintiff.—There is an allegation in the bill, that the plaintiff is desirous of having the property sold; that must be tantamount to an offer to redeem: *Parker v. Alcock* (b). The observations ascribed to Lord *Langdale* in *Dalton v. Hayter* (a) are mere obiter dicta.

The VICE-CHANCELLOR:—

The dismissal of a bill to redeem otherwise than for want of prosecution operates as a foreclosure. It may be questionable whether it would have this effect if it did not pray for redemption; and that observation is certainly in favour of the dictum in *Dalton v. Hayter*. I do not however say, that it would have been sufficient to convince me independently of that authority. Now the dictum in *Dalton v. Hayter* may be said to be extra judicial; but it is a clear and distinct expression of the opinion of a Judge of great experience and authority, upon a subject with

(a) 7 Beav. 319.

(b) *Younge*, 361.

which he has all his life been familiar. I cannot, therefore, act upon the opinion which I might have formed independently of that authority. The demurrer must be allowed, without costs, and with leave to amend generally.

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SIBBERING v. THE EARL OF BALCARRAS.

March 2nd.

THIS was a suit to set aside a sale, made in 1822, of an interest which was then reversionary in a small estate at Blackwood near Wigan. At that time, the property was vested in one Robert Sibbering for life, with remainder to his son, the plaintiff Ralph Sibbering, in fee, subject to three mortgages created by the father and son in favour of a Mr. Maudesley, a Mr. Gaskell, and Alexander then Earl of Balcarras.

The sale in question was effected by a deed, dated the 28th of June, 1822, whereby, in consideration of 200*l.*, the plaintiff conveyed to Alexander then Earl of Balcarras the reversion expectant on the death of Robert Sibbering, subject to the existing mortgages.

In 1823, the plaintiff joined in certain indentures of lease and release, dated the 30th and 31st of October in that year, whereby Maudesley, Gaskell, and the two Sibberings, in consideration of a release of the Earl's mortgage debt, and of the Earl paying the two other mortgage debts, conveyed the land to the Earl in fee.

The Earl died in 1825, and the present defendant was his devisee.

In 1830, Robert Sibbering died. The bill was filed in 1846; and the ground on which the sale was sought to be impeached, was that of undervalue; and evidence was adduced of the plaintiff having been, when it was made, in

In 1822, the owner of a reversion (expectant on a life estate, and subject to incumbrances) sold his reversion so subject. In 1825, the purchaser died, and, in 1830, the tenant for life died. In 1846, the reversioner filed a bill to set aside the sale as having been made at an undervalue, but not accounting for the delay: —*Held*, that the length of time afforded such evidence of the validity of the transaction as a Court of justice could not disregard; and, although twenty years had not elapsed since the death of the tenant for life, the bill was dismissed with costs.

The rules on which a Court acts with respect to stale

demands, are never more properly applied than where the nature of the case throws the burthen of proof on the defendant.

Harcourt v. White 28 Bea. 306. 311.
Brown v. M.C. (Lentick L. Rep 6 H.L. 471)

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distressed circumstances. The delay in filing the bill was unexplained.

Mr. *Lloyd* and Mr. *Bennett* for the plaintiff.—The burden of shewing the adequacy of the sum paid is upon the defendant, who has not adduced satisfactory evidence upon the subject. As to the lapse of time, a Court of equity acts by analogy to the statute of limitations, and twenty years have not elapsed since the plaintiff's title accrued in possession: *Gowland v. De Faria* (a), *Wood v. Abrey* (b), *Pickett v. Loggon* (c), *Wood v. Downes* (d), *Allfrey v. Allfrey* (e).

Mr. *Roundell Palmer* and Mr. *J. V. Prior*, for the defendant, were not called upon.

The VICE-CHANCELLOR:—

The bill in this case was filed in 1846, to set aside a sale made by the plaintiff in 1822, in such circumstances, that, had the sale been of any interest in possession, it could not, upon any principle of law or equity, or justice, have been impeached. It has been said, and not inaccurately, that this Court, whether soundly or not, does certainly act, with regard to sales of reversionary interests, upon principles in some degree peculiar to those cases, and not applicable to sales of interests in possession. I am, however, not at all sure, that this instance can be brought within the influence of these principles. The plaintiff, in 1823, concurred with his father and all the incumbrancers in conveying the entire interest in the estate, both in possession and reversion, to the late Earl of Balcarras. And it is not certain that that contract would have been carried into effect if the plaintiff had not joined.

(a) 17 Ves. 20.

(b) 3 Madd. 417.

(c) 14 Ves. 215.

(d) 18 Ves. 120.

(e) 1 Mac. & G. 87.

Assuming, however, that the principles applicable to sales of reversionary interests do apply to this case, and that the reversion was actually sold at an undervalue, as has been contended, how does the matter stand? The tenant for life died in 1830, more than sixteen years before the filing of the bill, and the purchaser died as long ago as 1825. The circumstances, condition, and history of the plaintiff during all the interval are entirely unexplained, except so far as an inference may legitimately be drawn from his condition previously to the sale. Under such circumstances, the Court is bound upon authority, and by reason, to presume strongly in favour of the validity of the transaction. The very length of time affords evidence which it is the duty of a Court of justice not to disregard. It has been said, that, if the case is to be treated by analogy to the statute of limitations, the plaintiff would have had twenty years after his father's death; and that this period had not elapsed at the time of filing the bill. But, although a Court of equity may consider itself bound, and may be bound for certain purposes, by the statute of limitations, it is not bound to give relief in every case where, under analogous circumstances, the statute of limitations would not have applied at law. It is the duty of the Court to act upon that presumption which a Court of justice most properly entertains against stale demands, and which can never be more properly applied than in a case like the present, where the burden of proof upon a most material point in controversy is thrown upon the defendant. I am of opinion that there is not sufficient to resist the presumption in favour of the transaction arising from length of time. Justice and reason appear to me to require that the bill should be dismissed, with costs.

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Accepted. Evans J. L. Rob. Esq. & A. Sept. 22/

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March 8th.

HIPKIN v. WILSON.

Lands were limited to a father for life, with remainder as the father and his son should appoint, with remainder to the son in tail, with remainder to the father and son in fee. The father and son appoint in fee, by way of mortgage, with a proviso, that, on repayment of the mortgage-money, the mortgagees should convey the hereditaments to the father and son, their heirs or assigns, or as they should direct; and it was declared, as between the father and son, that the father should, during his life, keep down the interest on the mortgage-debt: *Held*, that the course of limitation of the estate was not changed by this proviso.

THIS was a demurrer to a bill filed by persons claiming to be interested under limitations of the equity of redemption contained in a mortgage deed, which, it was submitted, had changed the devolution of the property.

The mortgagors were William Webster, the father, and William Webster, the son. By indentures, dated the 7th and 8th of December, 1826, the estate in question was conveyed to K. R. Clarke and G. P. Lowther, their executors, administrators, and assigns, for 2000 years, by way of mortgage, to secure 10,000*l.* and interest; and, subject thereto, to such uses as the father and son should jointly appoint; and, subject to such appointment, to the use of the father for life; with remainder to such uses as the son, if he should survive the father, should appoint; with remainder to the use of the son in tail; with an ultimate remainder to the father and son in fee as joint tenants.

The above mortgage was paid off; and that in question in the suit was effected by indentures of lease and release and appointment, dated the 23rd and 24th of December, 1839, and made between the father, the son, and the mortgagees, to whom the estate was conveyed in fee, subject to the following proviso for redemption:—

“Provided always, and it is hereby agreed and declared, that if the said William Webster, the father, and William Webster, the son, or either of them, or their or either of their heirs, executors, or administrators, do and shall pay unto the said [mortgagees] the sum of 2500*l.* [&c.] they the said [mortgagees] shall and will, upon the request, and at the costs and charges of the said William Webster, the father, and William Webster, the son, their heirs or assigns, convey and assure all and singular the said hereditaments and premises unto the said William Webster, the father, and

Whitbread v Smith / Drewry 537. 43 D. M. 4g. 732.

William Webster, the son, their heirs or assigns, or unto such other persons as they shall direct or appoint." The deed also contained a declaration that, as between the father and son, and without prejudice to the rights of the mortgagees, the mortgage debt should not be considered as the personal debt of either of them, but as a charge merely upon the mortgaged hereditaments; and that all interest which should be payable during the father's lifetime should be paid by him.

The son died in the lifetime of the father, who was also since dead; and the devisees of the father filed the present bill, praying for a declaration, that, under the limitations of the mortgage deed, the father and son became equitably entitled to the mortgaged hereditaments as joint tenants, subject to the mortgage, and that the plaintiffs were now entitled thereto. The defendants, who were the persons entitled under the original limitation to the son in tail, demurred generally for want of equity.

Mr. *Malins* and Mr. *Greene* supported the demurrer, and contended, that by the mortgage the original limitations were not intended to be and were not changed, except so far as was required for the purpose of the mortgage. They cited *Jackson v. Innes* (a).

Mr. *Swanston* and Mr. *Rasch*, for the plaintiffs, submitted, that an intention to change the devolution of the equity of redemption was apparent upon the mortgage deed.—They referred to *Lord Fauconberg v. Fitzgerald* (b), *Anson v. Lee* (c), *Barnett v. Wilson* (d), *Clark v. Burgh* (e).

The VICE-CHANCELLOR:—

The question is, whether there is to be collected from the

(a) 1 Bligh, 104.

(b) 6 Bro. P. C. 295.

(c) 4 Sim. 364.

(d) 2 Y. & C. C. C. 407.

(e) 2 Coll. 221.

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deed of 1839, as stated in the bill, an intention to change the course of limitation, or the manner of settlement, to any other extent than was necessary for the purpose of the mortgage. Independently of authority, I should think this question one that ought to be answered in favour of the defendants, and the authorities appear to support that view. It would perhaps be sufficient, to justify this conclusion, that there is not to be found in the deed of 1839 any expression of intention to vary the course of the settlement. But in this case there is what is equivalent to a declaration of a contrary intention, namely, a provision that the father is to keep down the interest upon the mortgage debt during his life.

Demurrer allowed.

March 14th.

WILD v. GLADSTONE.

Where a plaintiff, as one of a class, claimed a share of residue of a testator's estate against his executors, a plea by them of the plaintiff's illegitimacy, to be valid, must be put in on oath. Where this was not done, a plea was taken off the file of the Court.

THE plaintiff, by his bill, stated that a testator had bequeathed a share of residue to the children of Mr. Wild, and claimed a part of it as one of such children, and for the administration of his estate.

The defendant, the personal representative of the testator, put in a plea to this bill, that the plaintiff was illegitimate. The plea was not put in upon oath.

The plea now came on for argument.

Mr. *Russell* and Mr. *Glasse*, in support of the plea, submitted that it did not require to be put in upon the oath of the defendant. Lord *Redesdale*, in his *Treatise on Equity Pleading* (a), says:—"And pleas in bar of matters in pais must be upon oath of the defendant; but pleas to

(a) Mitf. Eq. Pl. 301, 4th edit.

the jurisdiction of the Court, or in disability of the person of the plaintiff, . . . need not be upon oath."

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Mr. *J. A. Cooke* in support of the bill.

The VICE-CHANCELLOR:—

I have no doubt that the plea ought to have been put in upon oath. My only doubt is, whether the plea should be overruled or ordered to be taken off the file. With leave of the Court, a notice may be given that the plea may be taken off the file.

Mr. *Russell*, for the defendant, consented that the case should be treated as if such a notice had been given and were now on.

The VICE-CHANCELLOR then directed the plea to be taken off the file.

HAIG v. GRAY.

May 1st.

THIS was a suit by a surviving partner against a debtor to the firm for an account of the dealings between the defendant and the partnership.

In a suit for an account by a surviving partner against a debtor to the firm, it is not in general necessary to make the personal representative of the deceased partner a party.

The defendant demurred for want of parties, the executor of the deceased partner not having been brought before the Court.

Mr. *Lee* and Mr. *F. S. Williams*, in support of the demurrer, cited *Miller v. Crawford* (a), *Wilkinson v. Henderson* (b), *Thorp v. Jackson* (c), *Hills v. Nash* (d).

(a) 9 Law J., Ch., N. S., 195.

(c) 2 Y. & C. 553.

(b) 1 M. & K. 589.

(d) 1 Ph. 598.

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Mr. *Russell* and Mr. *Haig* were not called upon to support the bill.

The VICE-CHANCELLOR:—

I apprehend it to be generally true, that, a debt having become due to a partnership of two persons, one of them having died, and the debt being in its nature demandable by a suit in equity, the surviving partner may sue for it in equity, (whether the amount is to depend on the result of an account or otherwise,) without making the representative of the deceased partner a party. There may, however, be circumstances requiring a departure from this general rule; and the question is, whether there are here any such circumstances? One relied upon is, that of the executor of the deceased partner having written to the debtor with respect to the debt, to accelerate its payment; but I do not think this sufficient to create an exception to the general rule. Another circumstance relied upon is, that the alleged debtor has himself filed a bill against the surviving partner, making the representative of the deceased partner a party to it. Assuming him to have been correct in taking that course, I think that it does not vary the right of the surviving partner to sue as he sues here.

Demurrer overruled, without costs.

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HAWKES v. THE EASTERN COUNTIES RAILWAY COMPANY.

March 13th.
1851.

March 14th.

BY an agreement, bearing date the 27th of May, 1847, and made between the Eastern Counties Railway Company of the one part, and Henry Hawkes of the other part, after reciting that the Company were promoting a bill before Parliament to enable them to make a railway from Wisbeach to Spalding; and that the proposed railway was intended to pass near to the residence of the said Henry Hawkes, situate at Spalding, in such a manner as would most seriously damage the same, and render it unfit for habitation; and after reciting that Henry Hawkes had hitherto opposed the passing of the said bill into a law, but had consented to withdraw his opposition, upon the said Company entering into the agreement thereafter contained,—it was expressed to be agreed by and between the parties thereto, that, in the event of the said bill in its then present or any amended, modified, or altered form, for the like objects or any or either of them, (and to which the said Eastern Counties Railway Company should be parties or promoters), passing into a law, the said Eastern Counties Railway Company, their successors or assigns, would purchase, and they thereby agreed to purchase, of and from the said Henry Hawkes and his heirs, and he thereby accordingly agreed to sell to the Company, their successors or assigns, the capital messuage and hereditaments therein described, for the price of 8000*l.*, to be paid by the Company within eighteen calendar months after the passing of such bill as aforesaid; and further, that, in addition to such purchase-money or sum of 8000*l.*, the said Company, their successors and assigns, would, at the same time, pay to the said Henry Hawkes, his executors, administrators, and assigns, the sum of

A Railway Company, contemplating a new branch, and endeavouring to obtain an Act for the purpose, contracted with a tenant for life for the purchase of the fee, and to obtain in their Act necessary powers for this purpose. Under the Act which they obtained, it was a question whether they had power to take more than a portion of the land:—*Held*, that they were nevertheless bound specifically to perform the agreement.

Quare, whether the same decision would have been given if the Company had, throughout, acted with good faith, and it had been certain that the tenant for life could have obtained adequate compensation at law.

ccc 2

Ld. J. Stuart v L. V. M. Western Ry. Co. 15 Beav. 521.
Gooday v The Colchester &c Ry. Co. 17 id. 135.
Thamesbury &c Ry. Co. v L. V. M. W. Ry. Co. 4 St. M. & N. 123.

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5000*l.*, as a compensation for the personal annoyance and inconvenience of compulsory eviction from his said residence; and further, that, inasmuch as Henry Hawkes, under the will of his late father, was only tenant for life of the said capital messuage and of the greater part of the said hereditaments, with remainders over in strict settlement, the Company would obtain all such powers and authorities, and do and perform all acts and things, and adopt all such measures, and pursue all such courses, either in or by such bill as aforesaid, or otherwise, as were, was, or should be necessary or required for enabling Henry Hawkes and his heirs, and all other necessary parties, to sell and convey, and the Company to purchase, the said hereditaments and premises from Henry Hawkes and his heirs, so as the same might become vested in the said Company, on payment of the said several sums aforesaid, for an estate of inheritance in fee simple in possession.

This agreement was entered into with reference to a projected divergent branch from the proposed Wisbeach and Spalding branch to Ambergate. The divergent branch was opposed, and the Act passed in such a shape that the limit of deviation of the branch line passed through the centre of Mr. Hawkes' settled property, thereby leaving a considerable portion of the subject of the contract unaffected by the provisions of the Act, unless it could be taken under the clause providing for extraordinary purposes.

The Act received the Royal assent on the 22nd of July, 1847. It contained provisions in the usual form, authorising the Company to purchase, for extraordinary purposes, land not exceeding thirty acres; and providing that the compulsory powers should not be exercised after the expiration of three years from the passing of the Act.

The Company did not avail themselves of the powers of the Act, but abandoned the branch altogether, and declined taking Mr. Hawkes' land. He, thereupon, instituted the present suit for a specific performance.

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The case set up by the Company in their answer was, that the bill, which received the Royal assent on the 22nd of July, 1847, and passed into a law, did not allow or in any manner authorise them to take and use the lands of the plaintiff for the construction of the railway. And they denied that the plaintiff could contract for the sale of that portion of the premises of which he was only tenant for life, or could make out a good title to that portion of the land. And they stated, amongst other things, that they had not raised any money under the said Act; and that, therefore, they had no funds out of which to construct the said railway; and that they had, before the institution of the suit, given the plaintiff notice that they had abandoned their intention of constructing the railway, or at all interfering with the lands and houses of the plaintiff, and had also, by such notice, informed him they would be ready and willing to pay him for any damages which he might have sustained by reason of the agreement.

In support of the defence, one of the Company's engineers deposed that the defendants continued to solicit the bill, which had been introduced into Parliament for the purpose of enabling them to obtain powers for the formation of the line of railway as originally intended, and used their best and utmost endeavours to get such bill passed into an Act, and endeavoured thereby to obtain powers for enabling themselves to form a junction between the Wisbeach and Spalding line and the Spalding branch of the Ambergate, Nottingham, and Boston Railway; but that, notwithstanding these endeavours of the defendants, and in consequence of the opposition of the London and York Railway Company, there was inserted in the Act of Parliament a clause preventing the defendants from forming a junction with the Ambergate Railway. He further deposed, that the portion of the gardens, pasture, and premises belonging to or in the occupation of the plaintiff, which was situated without the limits

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of deviation, contained four acres, one rood, and twenty-five perches, and was not required for, and could not be properly used for, any extraordinary or other purposes connected with the line of railway which was authorised to be constructed by the Act; and that these portions of the property were not, when the agreement of the 27th of May, 1847, was entered into, or now, required for any object or purpose for the performance or execution of which the defendants had been incorporated. He also deposed that the defendants had not made any commencement of the works authorised to be constructed by the said Acts of Parliament; and that, as the time within which the defendants were authorised to construct such works expired in July, 1852, he considered it improbable that such works could be completed by that time, as the land had not been bought. He further deposed, that the Company had not, to the best of his knowledge and belief, in any manner interfered with the plaintiff's enjoyment of the mansion house, garden, and premises, and had never taken possession thereof or any part thereof.

Mr. *Wigram* and Mr. *Follett* for the plaintiff.

Mr. *Russell*, Mr. *Malins*, and Mr. *Grove*, for the defendants.
—The directors had no power to enter into a contract to purchase the whole of this land; and it is not binding upon the Company, for the plaintiff must have known, that, to affix the corporate seal to a contract to purchase land with monies not by law applicable to such a purpose, would be a breach of trust. The contract, therefore, in its very nature must have been contingent upon the Act being obtained in such a shape as to authorise its being carried into effect. At all events, the Court will not compel a specific performance of an agreement to violate the law of the land. The legislature has not sanctioned this expendi-

ture of the corporate funds, or the acquisition by the corporation of the whole of this land. How can the Court direct that to be done, which, upon the application of any shareholder, it would prohibit by injunction? When the contract was entered into, the Company could not foresee that these obstacles would exist. They are not to blame for the existence of the difficulty; and as the plaintiff only seeks payment of a sum of money, an action will afford him all the redress (if any) to which he is entitled.

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The VICE-CHANCELLOR:—

The defence seems to me to fail in law and in equity, and not to be remarkable for honesty. There is nothing in it, as it appears to me, except a desire to escape from the performance of a contract, because it suits one of the parties to escape from it, if possible. It is said that there will be, or may be, great difficulty in finding the money. With that the plaintiff has no concern. It is said, that the defendants are not or will not be enabled to take or hold the property. It may or may not be so; but, in the particular circumstances of this case, that also is a point which for the present at least is not material.

It is then said, that the Acts of Parliament are such that a title cannot be given to the Company as to that portion of the lands of which the plaintiff is tenant for life only. It will be for the Master to say, in the first instance at least, how that part of the case stands; and if the Master shall be of opinion that the Acts of Parliament are such as not to enable a good title to be made to some part of the property by reason of the tenancy for life, it will then be incumbent on the Court to say whether, or how far, under this agreement, such a defence will be open to the defendants. But this is not the time for deciding that question, which possibly may never arise.

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An objection has been suggested as to the price for the land of which the plaintiff is merely tenant for life. If this contract shall be performed, the price for the whole must be apportioned when the proper time shall arrive. A particular course may be requisite to be taken for the purpose of ascertaining the amount ascribable to the settled property; and the plaintiff must consent to appropriate as much to it as the justice of the case may require. It has also been urged, in effect, that this is a case of hardship upon the Company; that the circumstances in which they are now placed with respect to Mr. Hawkes's property are materially different from any which their agents, when the contract was made, foresaw or contemplated, or were bound to foresee or contemplate as reasonably possible; that the Company's agents have acted throughout with good faith; and that it must be deemed certain that an action, if brought by Mr. Hawkes, would have given and will now give him all that he can justly want. How I should have dealt with the cause if these allegations had appeared to me correct and well-founded, I need not say; for assuredly I do not think them so.

There must be a decree for specific performance; and it must be referred to the Master to inquire whether a good title can be made to the messuage and hereditaments agreed to be sold to the Company by the contract of May, 1847; if he shall be of opinion that a title can be made, he will state when the title was first shewn; and in making the inquiry, the Master is to have regard to the terms of the contract, and particularly to the clauses in it relating to the property of which the plaintiff was mentioned as being tenant for life under the will of his father, and to the provisions of the Lands Clauses Consolidation Act (1845); with liberty to the Master to state any circumstances specially.

A decree was made accordingly; and under it the Master found that a good title could be made, and was first shewn on the 10th of May, 1850.

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To this report the defendants took several exceptions.

The sixth exception was:—For that the plaintiff, Henry Hawkes, claiming to be only tenant for life of the greater part of the property, is not empowered to sell and convey, and the Company is not empowered to purchase and take, such part of the property as is not shewn upon the deposited plan of the railway, nor described in the books of reference to such plan; the special Act and the Lands Clauses Consolidation Act not being applicable to land which is not so shewn and described; and, the whole property being comprised in one contract, the same cannot therefore be performed.

The seventh exception was:—For that the powers of the Company to purchase and take land are not and have never been in force, inasmuch as the capital proposed to be raised by the Wisbeach and Spalding special Act has not been subscribed for.

The cause now came on upon the exceptions, and upon further directions.

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March 14th.

Mr. *Russell*, Mr. *Malins*, and Mr. *Grove*, in support of the exceptions.—The enabling clauses of the Lands Clauses Consolidation Act, 1845, do not apply; for they only authorise contracts to be entered into by a tenant for life after the enabling clauses have been brought into operation by a special Act; whereas here the contract was entered into before the tenant for life had any power to bind the inheritance: *Edwards v. Grand Junction Conal Company*(a).

(a) 1 My. & Cr. 650.

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Moreover, the Lands Clauses Consolidation Act requires the land to be valued by a competent surveyor as a condition precedent to a contract by a tenant for life. This has never been done. [The *Vice-Chancellor*.—May not the omission, if it be an omission, be supplied, if the Company desire it, by having a valuation made under the section in question?] We submit that it is too late. Another fatal objection is, that the plaintiff is able only to convey to the Company the life estate; and it would be monstrous to compel the Company to pay 13,000*l.* for what is only worth 4000*l.* [The *Vice-Chancellor*.—May not the purchase-money be paid into Court, so that the persons entitled in remainder would not be allowed to have it paid out without confirming the purchase?] As to the greater portion of the property, it is altogether without the scope of the provisions of the Act, and therefore there would be no authority for the payment into Court of the total price, and there are no means of apportioning it. The corporation has no power to complete the contract. [The *Vice-Chancellor*.—Can it not pay the money?] Not without committing a breach of trust.

Mr. *Wigram* and Mr. *Follett* supported the report.

Mr. *Russell* in reply.

The VICE-CHANCELLOR:—

For the purpose of this contention I must assume that the testator was seised, by a good title.

The body which contracted with the tenant for life under the will, knew of the will, and contracted with express notice that he was tenant for life, under it, of part at least of the property contracted for. It is by no means new in this Court, to hold that a purchaser, with know-

ledge of a defect in the title, may so act as to waive the objection. The contract contains these passages:—[The *Vice-Chancellor* here read the part of the agreement relating to the title under the will.] The purchasers therefore contracted to do a certain thing. They failed or omitted to perform it, and now say, that, by reason of this failure, the vendor has no title. The objection is one of pure dishonesty, and I overrule it accordingly.

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This decision was affirmed by the *Lord Chancellor* (Lord *St. Leonard's*) on appeal, on the 15th of November, 1852 (a). *1 St. J. A. & S. 757*

(a) See *Webb v. Direct London and Portsmouth Railway Company*, 1 De G., Mac., & G. 521.

WACE v. BICKERTON.

UPON the treaty for a marriage between Mr. Stephen Price and Miss Mary Ann Wace, Mr. Thomas Price, the

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March 14th.

A father, in contemplation of the marriage of his son, proposed, in writing, to settle an estate in a specified parish, "worth 200*l.* a year," free from incumbrances, on himself, for life, with successive remainders to his son and his intended wife, and the children, charged with 50*l.* a year to his own widow, for life. By a settlement, not referring to the proposal, the father conveyed an estate, held in fee, worth 57*l.* a year, and an estate of which he was tenant for life, with limitation to his son in tail, of the yearly value of 190*l.*, both in the specified parish, to the proposed uses, and absolutely covenanted that the conveyed hereditaments were of the annual value of 200*l.*, and that he was absolutely seized in fee of them. The marriage took effect, and both the son and his wife died, leaving an infant daughter; the son had married a second time, and left a son, who became tenant in tail of the hereditaments worth 190*l.* a year. In a suit by the infant daughter and the trustee of her settlement, against the representatives of her grandfather, the settlor, for damages for the breach of his covenant:—*Held*, that the proposals could not be looked to as defining the value of the property to be settled; and that the plaintiffs were entitled to damages to the full extent of the value of the settled land, though that would create a total income under the settlement of 247*l.* instead of only 200*l.*

Scoble, that, where an infant, joining in a suit with other plaintiffs, asks by her bill less than she is entitled to, the Court will, at the hearing, give liberty to file a new bill, and even order one to be filed.

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father of Mr. Stephen Price, made a proposal in writing, dated the 25th of June, 1835, in the following terms:—

“Proposal for settlement of Mr. Stephen Price and M. A. Wace.

“Mr. Thomas Price proposes to settle an estate, in or near Kinnerley parish, worth 200*l.* a year, free from incumbrances, to himself for life, then to Stephen Price, chargeable with 50*l.* a-year in favour of Jane, wife of Thomas Price, for her life, then to M. A. Wace for life, then to all the children in such manner as the father and mother shall appoint, and in default to all the children equally, and if no child to Stephen Price.”

By an indenture, dated on the 30th of June, 1835, between Mr. Thomas Price of the first part, Mr. Richard Wace of the second part, Stephen Price of the third part, Miss Wace, the daughter of Mr. Wace, of the fourth part, and George Dicken and Henry Thomas Wace of the fifth part, being a settlement made in contemplation of, and shortly before, a marriage celebrated between Stephen Price and Mary Ann Wace, it was recited that a marriage was intended to be had between the said Stephen Price and M. A. Wace; and, in consideration thereof, it had been agreed that the said Thomas Price should make the settlement thereafter contained; and it was witnessed, that, in consideration of the marriage [and for a nominal consideration] the said Thomas Price (with the privy and consent of the said Stephen Price, Mary Ann Wace, and Richard Wace), did grant, release, direct, limit, and appoint all the messuages and hereditaments of him the said Thomas Price, in possession, reversion, remainder, expectancy, or otherwise howsoever, in or near the parish of Kinnerley, unto the said G. Dicken and H. T. Wace, their heirs and assigns; to the use, after the marriage, of Thomas Price for life, with remainder to the use that Jane Price, his wife, should receive thereout

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50% a-year; and, subject thereto, to the use of Stephen Price for life; with remainder to the use of Miss Wace for life; with remainders to the use of their child or children in fee; with a direction that if there should be only one child the estate should go to such only child. And Mr. Thomas Price covenanted with the trustees of the settlement in the following terms:—"And the said Thomas Price does hereby, for himself, his heirs, executors, and administrators, covenant with the said G. Dicken and H. T. Wace, their heirs, executors, administrators, and assigns, and also with the said Stephen Price, his executors and administrators, that the said hereditaments are now worth the annual sum of 200% ; and that the said Thomas Price is entitled thereto for an estate of inheritance in fee simple in possession, free from all payments and incumbrances whatsoever (except the said annuity of 50%); and that he the said Thomas Price and his heirs, and all other persons whomsoever, shall and will, whenever requested by the said trustees or any of them, execute any other deed or deeds that may be required for more effectually conveying the said hereditaments to the said G. Dicken and H. T. Wace, their heirs and assigns, upon and for the trusts and purposes hereinbefore mentioned." And in the same indenture was contained a general warranty of title by the said Thomas Price.

Mrs. M. A. Price died in 1836, leaving her husband, Mr. Stephen Price, and Mary Ann Price, the only child of the marriage, surviving.

Mr. Stephen Price subsequently married again, and died in 1846, leaving a son, the only child of that marriage.

Mr. Thomas Price died in 1842, having made a will, which was proved by Mr. Bickerton and Mr. Onions, the executors thereof.

Under these circumstances, Mr. Wace, as the surviving trustee of the marriage settlement of 1835, and Mary Ann Price, the sole infant child of that marriage, by her

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next friend, filed a bill against Mr. Bickerton and Mr. Onions, the executors of Mr. Thomas Price, stating the above circumstances; and also stating, that, at the date of the settlement, Mr. Thomas Price was seised in fee of an estate in Kinnerley of the annual value of 57*l.* only; and that, by an indenture, dated in 1794, another estate, also situated in Kinnerley, of the annual value of 190*l.*, had been settled to the use of Thomas Price for life, with remainder that Jane his wife should receive thereout 50*l.* for her life, with remainder to the first son of the body of Thomas Price in tail male, with remainder to the second and other sons in tail male, with an ultimate limitation to Thomas Price in fee; and praying that it might be declared under his covenant, contained in the settlement of 1835, that Thomas Price was indebted to H. T. Wace, as the surviving trustee of that settlement, in such a sum as would be sufficient to make up by its income the difference between the annual value of the premises in or near the parish of Kinnerley, of which Thomas Price was seised in fee simple in possession, at the date of the settlement of 1835, and the annual sum of 200*l.*

These facts were not in dispute; and at the hearing of the cause a decree was made, referring it to the Master to inquire what claim or demand, and to what amount, by way of damage or otherwise, the plaintiffs, or either of them, had against Mr. Bickerton and Mr. Onions, as the legal personal representatives of Thomas Price, under the covenant contained in the settlement of 1835. By his report, the Master stated, that he estimated the annual value of the estate of Mr. T. Price, held in fee simple, at about 57*l.* He also found, that the estate, included in the settlement of 1794, was comprised in the settlement of 1835; and he estimated the annual value of that estate at about 190*l.*; and he found that there was due to the plaintiffs in respect of damages upon the covenant for title such a sum as would produce 190*l.* a-year.

The cause now came on upon exceptions by the defendants to this report and for further directions.

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Mr. *Bacon* and Mr. *Elmsley* in support of the exceptions.—The Master ought not to have found that the estate comprised in the settlement of 1794 was included in the settlement of 1835. It was not specifically described, and it is not to be treated as having been included. It was in excess of the intention to be gathered from the proposals and the settlement of 1835 taken together. The maximum annual income which Mr. Thomas Price, the father, proposed or intended to settle, was an income of 200*l.* a year. Even if the settlement alone is looked at this is to be presumed. The estate of which Mr. Thomas Price was seised in fee, of the value of 57*l.*, was alone intended to be included; and the Master ought to have found 143*l.* a year only, making with the 57*l.* a year, 200*l.* to be the damages upon the covenant.

It is an established rule, that the intention of an instrument must be gathered from every part of it; and such a rule ought to be held most strongly to apply to instruments couched in obscure and inartificial language, as this instrument is. The plain meaning of the whole of this instrument is, that whatever was conveyed was to be of a value not less than 200*l.* a year. The settlor took upon himself the obligation to make up the difference between the actual income of 57*l.* and 200*l.* a year.

Mr. *Wigram* and Mr. *Goodeve* in support of the Master's report.—The estate which was included in the settlement of 1794, was comprised in the assurance by Mr. Price in 1835; he reserved to himself a life estate, and the 50*l.* a year for his widow, the precise use in the settlement of the estates settled in the year 1794: so far as they went, they were therefore included in the settlement. The covenants clearly applied to some estates of about or nearly approach-

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ing the value which the two estates taken together alone did.

Mr. *Wetherell* for other defendants.

The VICE-CHANCELLOR:—

I cannot look at the proposals. The settlement must speak for itself. I must hold that both the entailed and the fee simple estates were included in the parcels in the settlement of 1835. There is then a covenant that the settlor was seised in fee of all those parcels; the fact being, that he was not so seised. The Master had to consider the amount of damages, and he has taken the value of the entailed estate at the death of the settlor. Subject to any question as to the correctness of his estimate of the value, I think that he could not have done otherwise.

The cause then came on upon further directions.

Mr. *Bacon* and Mr. *Elmsley* on the further directions.—The scope of the bill and its prayer is confined to making good the difference between the 200*l.* a year and the annual value of the fee simple estate, thereby limiting the relief to be obtained in this suit to the difference between the annual value of the fee simple estate and 200*l.* a year.

The bill does not contain a suggestion of any claim to the extent of the entire value of the estate settled in 1794 beyond 200*l.* a year. The plaintiffs have defined the relief to be given by this Court, and they cannot be allowed to obtain any thing beyond what they have so asked.—[The *Vice-Chancellor* here referred to Mitford on Pleading (a), and read the following passage from that treatise:—“If the person who thus acts as friend of an infant does not lay his case properly before the Court, by collusion, neglect, or mistake, a new bill may be brought on behalf

of the infant; and, if a defect appears on the hearing of the cause, the Court may order it to stand over with liberty to amend the bill:" and said, that, if the argument of the defendants should prevail, he might give liberty to the plaintiffs to file a new bill, or even order such a bill to be filed.]

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Mr. *Bacon* and Mr. *Elmsley*, for the defendants, then waived this objection; and, assuming the bill to be sufficient and ample in its prayer for relief, suggested, that as the settlement of 1794 comprised an estate limited to Thomas Price for life, with remainder to Stephen Price for life, with remainder to the heirs of the body of Stephen; and that, although the infant son of Stephen had become tenant in tail of this property, yet, if he should die without issue and without barring the entail, that estate would, under the settlement of 1794, devolve on the infant plaintiff herself. Now, if full damages without condition were given, she would have both the estate and compensation for the loss of the estate, which would be inequitable. It is, therefore, suggested, that some provision ought to be inserted in the decree providing for this possibility.

The VICE-CHANCELLOR.—I think that the question ought to be left open, without intimating any opinion upon it; and that a proper sum should be carried to the credit of the cause, the income to be appropriated for the benefit of the infant plaintiff; but there must be a declaration, that this is to be without prejudice, in the event of the death without issue of the plaintiff's brother, to any question as to the right to the capital.

1850.

May 7th, 8th,
22nd.

In July, 1845, one of the followers of a dissenting preacher, (who styled himself The Servant of the Lord), having no property of his own, married another of the sect, who had a fortune of about 5000*l.*, under circumstances leading to the inference that the marriage was brought about entirely by the influence of the preacher.

In February, 1846, the wife, having manifested insubordination to the chief of the sect, was deserted by her husband, who, with the chief and others of his followers, went to reside together at an establishment which they formed, and called "Agapemone." They there professed and acted upon the doctrines, that the day of grace had passed, and the day of judgment commenced; and that, by reason thereof, prayer was superfluous, and no longer necessary.

They also professed and acted upon the doctrine that no day of the week ought to be set apart as one of peculiar holiness. Shortly after the desertion of the wife, she was delivered of a boy, who remained in the care of his mother and maternal grandmother, at the residence of the latter, who properly provided for his maintenance and education:—*Held*, a proper case for restraining the father from acquiring possession of the infant.

THOMAS v. ROBERTS.

THIS was a petition presented on behalf of George Nottidge Thomas, an infant of four years of age, the only child of the respondent George Robinson Thomas, praying that some proper person or persons might be appointed to be the guardian or guardians or to have the care of the infant during his minority; and that proper directions might be given for his maintenance and education; and that the respondent and his agents might be restrained from applying for any writ of habeas corpus for the purpose of obtaining possession or custody of the infant, and also from taking forcible means or otherwise to obtain possession of him, or in any manner interfering with him.

In 1842, the respondent, who had been a clergyman of the Church of England, had left that communion, and had become the follower of a Mr. Prince, who had also been a clergyman of the Established Church, but had become the founder of a sect over whom he possessed great influence, being regarded by them as peculiarly enjoying Divine favour. In that year, Agnes Nottidge and four of her sisters, being then all unmarried, and residing with their mother, became followers of Mr. Prince. They were each entitled to a fortune of between 5000*l.* and 6000*l.* In June, 1845, Miss Agnes Nottidge consented to marry the respondent; and two of her sisters, about the same time, consented to marry other followers of Mr. Prince, named Price and Cobbe. According to the affidavits in support of the petition, these marriages were imposed upon the ladies by the authority exercised over them by Prince. This, however, was denied by the affidavits in opposition to the application.

Mr. Thomas, in answer to a request that a settlement should be made, wrote the following letter:—

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“2, Windsor-terrace, Brighton, June 21st, 1845.

“My very dear Agnes,—It gave me pleasure, by a letter from dear brother Cobbe, to learn, that he had seen you off safely by mail on Thursday morning; by this time you are either with beloved brother Williams, or else with the dear Mrs. Maber. I know their love in Jesus, and that they will do every thing to render your sojourn in Swansea good for you; but I know something more, I know the boundless love of Jesus; he will be with you, for his eye is on you; and whatever is good that will he bestow, whether it be joy or sorrow, ease or trial, comfort or difficulty; all things are yours, for you are Christ's, and Christ is God's. Let not your heart be troubled under your present circumstances, neither let it be afraid at what friends or foes may suggest. Abide in the spirit and will of God; then will your peace be like a river wide and overflowing, and your soul will be borne sweetly along the stream of time until it reach the ocean of eternal love and rest. What I say unto you I say also unto you, Harriet and Clara. Assure them of my love, and let them trust themselves to be carried by faith in the arms of Jesus whithersoever he will—not whithersoever they will—and they and you will find He will do you good at your latter end. My beloved Agnes I must write to you just what the Spirit leads me to do; this I do with the more confidence, because I believe you have an ear to hear what the Lord may say unto you through him that loveth you. You mentioned your desire to have a settlement of your property upon yourself; this, I assured you, would be very agreeable to my feelings, and is so still; but, last evening waiting on God, this matter quite unexpectedly was brought before me. I had entirely put it away from my thoughts, leaving it to take its course as you might be led to act; but God will not have it so.

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He shews me that the principle is entirely contrary to God's word, and altogether at variance with that confidence which is to exist between us, who are one spirit. This desire on your part must be abandoned. Give it up to God, and shew that you can trust his faithfulness; and I can assure you the confidence you repose in him will not be disappointed. I know God, and I know that none who trust in him shall ever, can ever, be confounded. He that hath an ear to hear, let him hear. As regards the promise you made your parents, I would merely say, that any promise made when you were unconverted, and which was not in accordance with the word of God, you are not bound, neither would it be right in you, to adhere to. I must bid you farewell: and believe me to abide, in much love, yours affectionately in the everlasting covenant,

Brother THOMAS.

The respondent and Miss Agnes Nottidge were married on the 9th of July, 1845, at Swansea Church; on the same day Miss Clara Nottidge was married to Mr. Cobbe, and Miss Harriet Nottidge to Mr. Price—Mr. Prince being present, giving away the brides. No settlement was made of the property of any one of the ladies.

Soon afterwards, Prince sent to the respondent a summons in the following words: "Brother Thomas, I command you to arise, and come to Weymouth. Amen." The respondent, however, took his wife to visit his mother at Llandeilo for a month. His wife here used all her influence with her husband to dissuade him from again joining Prince, and for a time succeeded; but in October, 1845, they went to Weymouth, where Prince and some of his followers lived in a house altogether.

Mrs. Thomas hearing that Prince was corresponding with her sister Louisa, to induce her to come also to reside at Weymouth, was writing a letter to her to dissuade her, when one of the brethren, who was staying in the house, looked

over her shoulder and read what she had written, and then snatching it away took it to Prince; and that evening, when she was proceeding to the bed-room usually occupied by her and her husband, the latter forbade her to go, adding, "in writing that letter you have deeply sinned against God's Holy Spirit. I therefore care nothing about you nor what becomes of you. The room adjoining this is empty. You can go there if you please, so that you be not near me;" and from the Friday until Wednesday following the respondent slept in a different room from his wife.

In the latter part of 1845, Prince began to profess and preach, that prayer, whether public or private, was no longer requisite, and ought to be abandoned.

In February, 1846, the respondent left Weymouth and followed Prince to Bridgewater. Soon afterwards, upon the respondent admitting that his wife was pregnant, Prince expressed great anger, and forbade him to return to her. In the same month of February, 1846, Williams and his wife, two of Mr. Prince's followers, assumed the management of the house at Weymouth, and expelled the respondent's wife from it. She proceeded thence alone to Carmarthenshire, to the house of the respondent's mother, who treated her with great kindness. She was then in the sixth month of her pregnancy. After her confinement she was dangerously ill, of which fact her husband was informed by letter; and he was also asked by letter by what name his child should be baptized, but he did not reply. He had never, since February, 1846, returned to his wife.

Prince afterwards asked her: "Can your heart submit to God's right to dispose of you and the child you have called yours?" To which she replied she could never acknowledge man as God, and that she would not give up the care of the child. Upon this the respondent sent her a letter, renouncing her for ever; and she had, with her son, for

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the last three years been residing with Mrs. Nottidge, her mother, in Suffolk.

Since the beginning of the year 1847, Prince and about thirty followers had lived at "the Agapemone," at Bridgewater, a large building having a flag on the top, inscribed with the words "Oh, hail, holy Love." The other facts of the case sufficiently appear from the judgment.

Mr. *Wigram* and Mr. *Goldsmid*, in support of the petition, contended, that, upon the evidence, it was clear that the respondent had abandoned his wife and child; and that there were sufficient grounds for exercising the jurisdiction which the Court had exercised in other cases, of preventing the father from obtaining the custody of the infant.

Mr. Thomas, the respondent, then addressed the Court.—He read affidavits which are sufficiently stated below in the judgment; and he said, that, when Mrs. Thomas married him, she knew what his sentiments were. She entertained the same. She adopted them of her own free will, before he knew her, or had any connexion or intercourse with her; and being of one mind, and, as he supposed, wholly of the same views, and admiring the same truth, and loving the same God—holding these views in common, they were married. It was absurd to say, under these circumstances, that the marriage took place under the influence or at the request of Prince. She was a lady between twenty-eight and thirty years of age, quite old enough to know her own mind and to act for herself. It was assuredly of her own free will that she declared her attachment to him. But it did appear afterwards, that, whilst she outwardly professed to be of the same mind and pretended to hold the same views, and to have no difference of opinion, yet in secret she maintained other views, and acted contrary to that which she had formerly professed. In consequence of this, she wrote letters to her sister at Rose-hill. After expressing sorrow for what she

had done, yet she wrote another without his knowledge, quite contrary to what she had professed, and so acting hypocritically and deceitfully. If she had candidly said she was of his opinion formerly, but afterwards thought and felt differently; if she had come forward openly and acknowledged what her mind was, he should have thought nothing of it. Again, it had been asserted that Mr. Williams was sent to Weymouth by his authority to deal harshly and unkindly in turning his wife out of doors. That was utterly untrue, and was denied by Mr. Williams's own affidavit. He merely requested her to leave the house at Weymouth, and to go to his (the respondent's) mother's in Wales, whither she went. He did not deny that the use of prayer was discontinued. Prayer was a means to an end. It was the longing after something, and the expression of that desire. But the followers of Mr. Prince now had what they had sought for, they enjoyed what they had hungered and thirsted after. They prayed not, because their prayers were turned into praise. He then repeated an anthem, which Mr. Prince's followers were in the habit of singing, as follows:—

Holy Father, Love alone!
 Holy Love, eternal Son!
 Holy Spirit, once unknown!
 Holy Three, thy name is One.
 Glory be, O God, to thee!
 Glorious in eternity!
 Glory be, O Love, to thee!
 Glorious in thy purity!

It might be true that they did not read the Scriptures as once they did. It was because they regarded the Scriptures as a means to an end. It was the book that brought them to God. As to unchastity or immorality, he defied the world to bring forward against them any charge of immoral conduct. He described the recreations of the inmates of the "Agapemone," and extolled the beauty of the

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horses kept for their use; but declared, that they carried God into all their amusements. He concluded by maintaining, that in the end all would acknowledge the truth of the principles which he held, and would confess, that the "Agapemone" was a work of God—pure, holy, and glorious.

May 22nd. The VICE-CHANCELLOR:—

This case is before the Court on a petition presented in the name of George Nottidge Thomas, an infant, by his uncle-in-law, Mr. Frederick Peter Ripley, as his next friend. It prays [His Honour read the prayer].

The petitioner, at present in the fourth year of his age, is the only child of the marriage of his parents, who are both living, one of them being Mr. George Robinson Thomas, mentioned in the prayer and many other parts of the petition, who, a native, I collect, of Wales, seems to have been educated at Lampeter with a view to becoming, as he in fact became, a minister of the Church of England.

I do not, however, collect that he proceeded beyond deacon's orders, or that he now considers himself to be a member of that Church: I understand him to dissent, and to have seceded from it. Nor do I gather from the evidence, or from the observations which he addressed in person to the Court, that he has at present any preferment, office, employment, business, fortune, or source of income whatsoever. His wife, the petitioner's mother, is one of the daughters of a gentleman of good fortune, who resided in Suffolk. He died before her marriage, leaving a widow, still living, the grandmother of the infant under whose protection and in whose house the child now is. This lady, I collect, to be a person in good circumstances and of respectability. The daughters' portions seem to have been at least as much as in the station of society to which they belonged is usual. That of Miss Agnes Nottidge, the petitioner's mother, was, I think, between 5000*l.* and 6000*l.* The

marriage, which, whether equal or unequal otherwise than in point of fortune, seems in that respect at least to have been unequal, (for Mr. Thomas had not, I believe, any property,) took place without the consent and against the wishes of Mrs. Nottidge, and seems in a considerable degree ascribable, so far at least as Miss Agnes Nottidge was concerned, to the influence and ascendancy over her mind which (it must, I fear, be said unhappily for her,) had been acquired and were exercised by a fanatic or pseudo-fanatic preacher, styling himself "the Servant of the Lord," who appears to have acted, ostensibly, less as a go-between than as a spiritual director, in forming this and other matches between endowed ladies and such of his followers or associates of the other sex as were judged fit for the purpose. One of these was Mr. Thomas, whom Miss Agnes Nottidge seems to have been made to believe, that it was the will of God, revealed through "the Servant of the Lord," that she should marry; and she did so, as I have said, very much upon that ground. Thus at least the evidence strikes me, and here I should qualify a statement that I have made as to her husband's means, for she married without a settlement, and her fortune appears to have come consequently very much or altogether into his power, as (if it remains) it still seems to be. The want of a settlement was however not through oversight; she mentioned the subject to him, and seems at the same time to have mentioned a promise, connected perhaps with it, that she had made to one or both of her parents. I say this, because it appears, that, not quite three weeks before the marriage, Mr. Thomas was able, and permitted himself, to write to her this all but impossible letter [His Honour read the letter set out above.]

Even this unparalleled performance failed to open the lady's eyes; and, her marriage taking place on the 9th of July, 1845, she so became annexed by an additional tie to the school or suite of "the Servant of the Lord."

The bride and bridegroom lived together at various places

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from the time of their marriage, rather more than half a year. During the latter part of that period they were at Weymouth, lodged in a house where "the Servant of the Lord" and others were also living; and here Mrs. Thomas appears to have received, I regret to say, from her husband, and not from him alone, treatment, on more than one occasion, of a coarse, harsh, and unmanly description; which was not, if it could have been, in any manner deserved.

In January, 1846, "the Servant of the Lord," and some of his followers or associates, went, I believe, professionally to Bridgwater, leaving others of them, including Mr. and Mrs. Thomas, behind at Weymouth; but some of these, including Mr. Thomas, though not his wife, were soon (it seems) sent for. The summons, which professed I believe to be a call to attend a spiritual tea party at Bridgwater, was obeyed; and accordingly, on the 2nd of February, 1846, Mr. Thomas departed from Weymouth, leaving his wife there, but promising or expected to return in two days. She was then to his knowledge in the fifth or sixth month of pregnancy with her first and only child, the infant now before the Court. This her state was learned by "the Servant of the Lord" for the first time at Bridgwater, as I collect; and he seems to have remonstrated or reasoned on the subject at that place with Mr. Thomas, who, instead of returning to Weymouth, sent thither for his clothes, which his wife packed and transmitted to Bridgwater accordingly. Having received them, he wrote on the 7th, I believe, of the same February, and despatched to her this indescribable communication.

"Saturday night, Bridgewater.

"My best beloved,—I herewith inclose you a small portion, eat, drink, yea drink abundantly, and let your soul delight in fatness, let the will of God be your home and resting place. Out of His will there can be no happiness, but in His will there is life and joy and peace. 'The Servant of the Lord' told me that you would not be in your present state, unless you had rebelled months ago; and thus

you will suffer for it, in not being able to go about with me as you otherwise would; but when I see you I will tell you all about it. For the present abide quietly where you are, and go on as if I were with you. I have seen all the articles you sent in my portmanteau. I found much pleasure in looking at all the little things you had packed up. I do love you more than I can tell; we are parted outwardly, but we shall meet the closer as the consequence; we are separated now, but we are not severed; we see each other not, but we are one. For the present, farewell. Let Harriet and Clara have as much love from me as I can offer after that I give you. I abide dearest the same, your unchanging and affectionate

Brother THOMAS."

When it is known that the writer of this letter did not return to his wife, but that his departure from her on the 2nd of February was the commencement of a total separation from her, which has ever since continued, a separation wilful equally and causeless on his part, such a composition may seem to the last degree perplexing. But when it is certain, that, by the passage "The Servant of the Lord told me that you would not be in your present state, unless you had rebelled months ago; and thus you will suffer for it, in not being able to go about with me as you otherwise would; but when I see you I will tell you all about it;"—the writer referred to the fact that his wife, the person addressed, to whom he had not been more than seven months married, was then with child by him, one is driven with shame and indignation to hope that there may not be a second human being capable of such extravagant indecency.

On the 2nd of February, 1846, then, this confiding and unoffending woman was, without the slightest justification, apology, or excuse, deserted and abandoned,—wilfully, completely, and finally deserted and abandoned—by her husband, in the state which has been mentioned. He has

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never since visited her, spoken to her, or, unless perhaps during his attempts, in the spring of the present year, to gain possession of the person of her child and admittance into her house, seen her. I say "her house," because it shelters her. It is, in fact, the house of her mother, Mrs. Nottidge, in Suffolk, where Mrs. Thomas and her son have, for the last three years or more, found that protection and that home which the father of the child has refused them.

It must not be inferred, however, that Mr. Thomas left his wife and child to starve, or be dependent on bounty merely or parish relief. It is right to say, that he has from time to time transmitted or permitted to be paid to her the income or part of the income of the property that he acquired in her right by persuading her of the impiety of marriage settlements,—property, of which the entire income, supposing it received by her, was not in amount, I collect, more than sufficient, if sufficient, for the proper maintenance of herself and the child; both of whom have, as to her ever since the 2nd of February, 1846, and as to the child always, been left by the husband without provision except as I have stated, and wholly without protection, care, or help. I do not, indeed, I repeat, believe that, so far as money is concerned, he had or has, except from her property, (that is, the property acquired by his marriage,) the means of maintaining or contributing to the maintenance of either.

Though informed of the birth of his son immediately or within a proper time after the event, and asked before the christening what should be the name, he does not appear to have acknowledged the communication, noticed the request, or exhibited any feeling of affection, any interest or any concern, for or about the child; or indeed, until the attempt at carrying him away forcibly or clandestinely from his mother, which was made in March in the present year, to have seen or wished to see him. Such a course of conduct would, in the absence, which there has been and is, of

all misbehaviour on the wife's part and of any rational cause of complaint against her, seem inexplicable, except upon some supposition which I desire to think inadmissible, or the supposition that the influence and ascendancy of the person calling himself "the Servant of the Lord" have been exerted for the purpose, and prevail over Mr. Thomas as strongly as at one time over his wife. I collect, that, after the marriage, she exhibited symptoms of insubordination—not towards her husband, but towards "the Servant of the Lord," attempted to shake her husband's allegiance towards him, and was found out; to which grievances was added seemingly this, that either a prophecy or a behest had been contravened by her being in the family-way. However, upon these or no more just grounds, it is, I think, to be inferred from the evidence, that "the Servant of the Lord" took a dislike to Mrs. Thomas after the marriage, and did mainly, if not solely, influence her husband's mind in his ill-treatment, his unmanly treatment, of her, and at least contribute to the separation, if not directly cause it.

Nor ought it probably to be ascribed to Mr. Thomas's spontaneous feelings or undirected judgment, that he wrote to her that coarse and shameful letter, having, it seems probable, some reference to an action between Mr. Ripley and one of her sisters, a witness on this occasion for the respondent, which is dated 2nd of November, 1848, and was in these terms:—

"The Agapemone, November 2nd, 1848.

"Agnes,—Whilst I thought you followed your unhappy course quietly, I did not feel disposed to interfere with you; but since it has come to my knowledge that you have spoken wickedly of God's holy truth, and declared gross and scandalous lies of those I most honour, love, and esteem, I am resolved to adopt a different course towards you. How wretched is your condition! given up to your

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own wicked heart, you love and make a lie, and drink in as sweet food for your malice the vilest and most disgusting scandal. Shame on you! it is out of the abundance of your own carnal heart that your mouth speaketh. Oh, Agnes! what have you lost! However, I write merely to inform you of my determination concerning you. God is, I know Him, deep, pure, holy, gentle Love; I am His and He is mine; you are mine, and I am resolved to use the authority God has given me to put a stop to your lying slanders; and for this purpose I can and will compel you to live where and how I please, and subject to my will and authority. Through God's pure love to me, I have hitherto yielded to you the greatest indulgence; and you have abused the liberty and independence I trusted you with, as you have abused your other blessings. I have, therefore, felt the necessity of making you aware that I can and will direct your life; and this I will cause you to know by my actions and not only by my words. Should you write again, or speak so, knowingly contrary to my wishes and to the truth, I will immediately remove your residence, and take the child under my own eye, and superintend the expenditure of the money for God's glory. I do not know that, under any circumstances, I shall look over your gross and selfish abuse of my forbearance towards you. Concerning the child, learn that I will do with it as God shall guide me,—God, who is love, wholly undefiled love, but who could wither the pride and independence of your heart in one moment. As to my immediate conduct towards you personally, it will depend on yourself; for, be sure, I will do what I may deem good after this warning, without giving you any further notice. Blest beyond conception by the knowledge of God in His pure, holy, and unchanging love and truth, I abide,

“ Brother THOMAS.”

The power of “ the Servant of the Lord ” over Mr. Tho-

mas's mind seems to have continued and to continue undiminished, though Mrs. Thomas appears to have been cured. It is in such a state of things that Mr. Thomas has, within the last three months, been endeavouring, and still avows an intention, if possible, to regain, I was about to say, but that would be wrong,—to acquire, I mean, the possession and custody of the person of his son, which would of course involve the care and direction of his education.

Now, considering the boy's age, the respectability of the house that shelters him, and the care under which he is, I am not sure that, if there were nothing in the case but these and the other facts that I have mentioned, it would be proper to dismiss the petition, especially as it is certain or probable that a sufficient provision for the maintenance and education of the petitioner during his minority, independently of any assistance from his father, is or can and will be made. But it is not necessary to decide that point; for there are other facts of importance: before proceeding to which I would ask specifically—how, so far as money or property is concerned, if the father shall have the powers and duties of guardianship, is he, from his income, to provide properly for the child's maintenance and education? This question, when the wife's clear title to alimony, and her husband's position and circumstances are remembered, must probably be of very difficult solution—nor indeed, perhaps, has he thought much, if at all, about the matter.

To what home, however, in such an event, to what abode, is he to take the child? To none suggested, except the somewhat mysterious establishment so often mentioned during the argument and in the affidavits, of which it seems necessary to say a few words.

It appears that "the Servant of the Lord," with or without the aid of others, has founded or formed a kind of cœnobitical establishment, which, though placed not on the

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Euripus, but on the Bristol Channel, he has denominated Agapemone, a name no doubt adopted in order to make the people of Somersetshire understand or guess its object; which, however, unluckily, I fear that few either there or elsewhere in any very clear manner do. "The Servant of the Lord," as may be supposed, presides and governs, but not perhaps strictly as an archimandrite or abbot, for the establishment scarcely seems to be a convent, either in connection with the Greek church or otherwise.

Its inmates, who are not few, and are of each sex, can hardly be nuns and friars; for some, though not all of them, are married couples, and the men and women are not separated. They, however, call themselves and address each other as brothers and sisters; there appears to be something, whether really as well as professedly, or professedly alone, in the nature or design of the institution, which perhaps might render it fit to be described as a Spiritual Boarding House: though, to what kind of religion, if any, the inmates belong, does not I think appear. I believe that they do not attend any place of worship in or out of this establishment. They sing hymns, I think, addressed to the Supreme Being; but, as I collect, they do not, in the sense of supplication or entreaty to God, pray at all. The Agapemonians appear to set a high value on bodily exercise of a cheerful and amusing kind. Their stable, according to the description which Mr. Thomas gave me of it, must be unexceptionable. It does not appear whether the Agapemonians hunt, but they seem distinguished both as Cavaliers and Charioteers. They play, moreover, frequently or occasionally, at lively and energetic games, such as hockey, ladies and all. So that their life may be considered less ascetic than frolicsome. The particulars, however, of the Agapemonians' esoteric existence, being not open to general observation, are little, if at all, known beyond their own boundary. But to works of usefulness or charity without, they do not seem, so far as I can collect, addicted.

Now, this is the establishment in which Mr. Thomas has for a considerable time been and is one of the dwellers, he has, I apprehend, no other home, and thither accordingly I suppose that he would take his son. But God forbid that I should be accessory to condemning any child to such a state of probable debasement; as lief would I have on my conscience the consigning of this boy to a camp of Gypsies.

It may be suggested, however, that Mr. Thomas, though he has not stated any intention of leaving Agapemone, or placing his son elsewhere, may possibly be willing and able to find some other abode for him; and it has seemed to me proper, upon that supposition, and otherwise, to consider whether Mr. Thomas has or has not opinions upon important points, such as to disqualify him, in this country, for the guardianship of an English child.

In the first place, I think it right to say that I am satisfied with his denial of believing "the Servant of the Lord" to be a Deity, or not of the human nature; but that I doubt whether Mr. Thomas's mind is entirely free from participation in certain views concerning "the Servant of the Lord," not very dissimilar to the opinions entertained concerning an eminent personage of the 7th century, by those who consider that personage a prophet; and that I doubt, moreover, whether a man, who, having been ordained a minister of religion, as a Christian in a Christian community, has designedly and systematically given up attending, and designedly and systematically avoids attending any place of worship (whatever his private feelings may be, and whatever hymns he may sing), ought in any condition of circumstances to be permitted in this country to have the guardianship or care of an English child, for whose maintenance and education there exist any other means of providing, though the child be his own. But that particular question I think it not, in the present instance, necessary to decide, and I wish to be understood as giving no opinion upon it.

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However this may be, I apprehend that, in England, a man who holds the opinion, that prayer—I mean prayer in the sense of entreaty and supplication to the Almighty—is no part of duty, but is superfluous; who considers, moreover, that there is not any day of the week which ought to be observed as a Sabbath, as a day of peculiar rest, or as one of peculiar holiness, or in a manner distinct from other days, must be deemed to entertain opinions noxious to society, adverse to civilization, opposed to the usages of Christendom, contrary (in the case of prayer at least) to the express command of the New Testament, and, finally, pernicious necessarily in the highest degree to any young person unhappy enough to be imbued with them—I say in England.

If this is a just view of such opinions, they must, if avowed and carried into practice, disqualify him who avows them and carries them into practice for the education, and, in my judgment, for the guardianship of an English child, whether his own son or any other,—an observation, if liable to any exception or qualification, liable to exception or qualification, I apprehend, in the single and unlikely case of a moral certainty or high degree of probability existing that the opinions will not be communicated to the child,—that the child will escape the infection,—that he will remain untainted. But, these opinions are avowed by Mr. Thomas to be his. He carries them into practice. He has not professed any intention of not communicating them to his son, if placed under his charge: and had such an intention been expressed, I should, I own, have thought it of impossible or very improbable performance. In this respect I might found myself perhaps alone on his address to the Court, delivered upon the hearing of the petition, to which I listened carefully.

Whether upon or without consideration of that address, however, I view the affidavits as containing evidence de-

cisive on this point,—evidence which, coupled with some few other passages, I think it right to state in the very words: and first, I take up two affidavits made by six of the Agapemonians. Three of these six describe themselves as clerks, that is, clergymen; one being, I believe, the brother-in-law of “the Servant of the Lord,” who is not a deponent in either of these affidavits, nor a witness at all; but his wife is one of the six whom I have just mentioned. This lady describes herself as “Julia Prince, wife of Henry James Prince, of the same place, clerk;” (“the same place” being Agapemone). There is also another lady among the six, who all depose thus:—

They “say and affirm, that the said Henry James Prince and his followers, as asserted in the petition, ever used expressions of contempt and derision with regard to the Holy Scriptures, is a wicked, hideous, and diabolical lie, which they cannot too indignantly repel; that the said Henry James Prince was not in the habit of stating, at any meetings, to the persons assembled, that all their relations and friends who did not acknowledge the Spirit of God in him would be eternally damned; that it is utterly false and a wicked perversion of truth, that people were admitted to the tea-meeting upon the grounds of their rejoicing in the damnation of their friends; that the moral conduct of the said George Robinson Thomas is and always has been most exemplary and free from imputation, and his manners mild and gentlemanly; that deponents and others amused themselves in various ways, both for health and exercise, and that they sometimes play at ‘hockey,’ which is not a game like football, and which deponents consider very ridiculous to be obliged to refer to; that deponents do not regard one day from another, but every day alike, but each unto the Lord; that the said Henry James Prince has not propounded any blasphemous or irreligious doctrines; and to assert that he has a Divine character, and is a proper object of worship, is a blasphe-

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mous and hideous lie; that the servants of the said Henry James Prince have, by his direction, threatened to let loose the bloodhounds upon any one coming within the walls, is a direct falsehood; that deponents are not under the influence or control of the said Henry James Prince, but enjoy the most perfect liberty; their life is the purity of truth, their dwelling the rest of holy love, and their delight the glory of God; their peace is like a river, and their strength the munition of rocks."

I have read from one only of these affidavits, because what I have read from it represents with substantial (almost literal) exactness corresponding passages in the other.

Mrs. Thomas's three sisters, who are in the establishment, have joined in an affidavit in these terms:—They say "that they are the sisters of Agnes Thomas, the mother of the infant; that they did, in the year 1842, attend the ministry of the Rev. Henry James Prince, at Stoke, near Clare, Suffolk, and were greatly blessed by it; that they were also privileged to visit the said Henry James Prince and the Rev. Samuel Starkey at their residence, but that they were not ever requested by the said Henry James Prince and the Rev. Samuel Starkey, or either of them, to do so; that, on the contrary, it was the constant and repeated request of deponents and of the said Agnes Thomas that they might be allowed to do so; that the preaching of the said Henry James Prince was in truth, in simplicity, and in power; that his godliness was real, his exhortations faithful; but that he or the said Samuel Starkey ever assured deponents, that, in order to become true Christians, they must disregard the advice of their parents and other members of their family, and obey the directions of the said Henry James Prince, is a gross falsehood." The deponents Harriet Lancaster Price and Clara Cobbe say, "that deponents married their respective husbands, not by command or at the request of the said Rev. Henry James Prince, but purely of

their own free choice; that the said Henry James Prince extorted from either a promise to marry is a gross falsehood; that the said Henry James Prince was not present at their interview with the said Emily Nottidge and Frederick Peter Ripley, at Swansea, nor was he at that time at Swansea; but at such interview, as at all other times, they acted according to their own free and unfettered will; that deponents were informed, by the direction of the said Henry James Prince, that there was no longer any occasion for their reading the Bible, as their husbands were now their bibles, and that deponents would know through them the will of God as made known to them by the said Henry James Prince, is false; that deponents and the said Agnes Thomas were not compelled to employ themselves the greater part of the night of the 4th of February, 1846, in packing their husbands' clothes, nor were they engaged in such packing more than one hour, the things required being linen, &c., for a few days; and that they never understood that they were not to see their husbands again; that the said Agnes Thomas was not treated rudely or harshly by the said Thomas Williams, in the month of February, 1846; but that, in consequence of her temper and disposition at the time, there could be no pleasant communication between her and those residing in the same house; and that the said Agnes Thomas frequently acknowledged to deponents that she was in a state of rebellion against God, and expressed a desire openly to acknowledge it, for the example of others."

Mrs. Thomas, whose affidavit I have considered receivable upon a proceeding of the present nature, though her husband is the respondent, makes in it, as does Miss Cornelia Nottidge in her's, various statements, some positively, some as to information and belief, not all controverted, not all met; and it has appeared to me, that I may, consistently with justice and every rule of procedure, and that I ought, to allow weight and efficacy, in support of the

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petition, to many of those statements, and particularly (though not exclusively) to the passages extracted from them, which I will now read: "That, during the latter part of 1845, the said Henry James Prince was in the habit of holding meetings at various villages near Weymouth, whereat he and his leading followers preached; and that sometimes one and sometimes another of the said George Robinson Thomas, Lewis Price, and Thomas Williams, did by the direction of the said Henry James Prince, usually preach and announce to the persons assembled thereat the immediate coming of Christ, and exclaim, in the loudest tone, 'Behold, he cometh! he cometh!'" and a little further on, "And the said Henry James Prince, in the latter part of 1845, frequently professed the doctrine, that the practice of prayer, whether private or public, is useless, and ought to be abandoned; and he required his followers to abandon such practice accordingly; and I have been informed and verily believe, that the last-mentioned doctrine has ever since been and now is professed by the said Henry James Prince and his followers." And again she says: "And I have been informed and verily believe, that, during part of the year 1846, the said Henry James Prince and his principal followers, including the said Samuel Starkey and his wife, the said Thomas Williams and his wife, and the said George Robinson Thomas, Lewis Price, William Cobbe, and Clara Cobbe, resided at Charlinch aforesaid, and during the latter part of the same year at Weymouth; and that, ever since the early part of the year 1847, the said Henry James Prince and his principal followers of both sexes, to the number of thirty and upwards, including the said Samuel Starkey and his wife, the said Thomas Williams and his wife, and the said George Robinson Thomas, Lewis Price, William Cobbe, and Clara Cobbe, have resided together in a large building at Charlinch aforesaid, which building the said Henry James Prince had caused to be prepared, and to which he gave the name of 'Agapemone;' and that such

building, together with certain outbuildings and yards attached thereto, was and is surrounded by high thick walls; and that, at the top of such building, a flag is usually displayed, bearing thereon a representation of a lion and a lamb, and an inscription in the words following: 'Oh hail! holy Love!' Say, that I have been informed and verily believe, that the said Henry James Prince and his followers continue to profess the same doctrines which were professed by him and them in 1845 and 1846, as aforesaid; and that he and they, by his direction, have likewise adopted and profess a doctrine, that neither Sunday nor any other day of the week ought to be observed as a Sabbath or day of rest or sacred day; and I have been informed and verily believe, that the men and many of the women resident in the said building called 'Agapemone,' have, by the direction of the said Henry James Prince, adopted and pursued a practice of playing together at various athletic games, and, among others, at a game called 'hockey,' resembling football, and of playing at such games as well on Sundays as on other days; and that, in order more fully to act upon the aforesaid doctrine, as to the usefulness of prayer, the said Henry James Prince, in or before the year 1849, as I have been informed and verily believe, caused a building, adjoining the said 'Agapemone,' which had been fitted up as a chapel, to be altered into an ordinary room; and that the said Henry James Prince has for some time past not attended any place of worship." And again, a little further on, "Say, that, as I have been informed and believe, the income derived by the said Henry James Prince, from his own property, does not exceed 400*l*. a year; but that, by means of large sums of money which he obtains from his followers, he has, since he has established himself in the said 'Agapemone,' been enabled to live in an expensive manner, and to keep a carriage and four horses for drawing the same, and several handsome saddle horses; and that he has been in the habit of riding in the neighbourhood of

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Charlinch, in the said carriage drawn by four horses, also of riding out in such neighbourhood, attended by a large cavalcade of his followers, and being himself on such occasions usually mounted on a handsome horse, to which he has given the name of 'Glory.' "

[His Honour also read extracts from the affidavit of Cornelia Nottidge, which supported the statements made by her sister in every respect.]

Mr. Maynard, who is the solicitor of the next friend of the infant, but probably is not more biassed than the other deponents on either side, if so much, and is a man of standing and repute in his profession, and I think a trustworthy witness, deposes thus:—"I was employed as solicitor in the action of *Ripley v. Nottidge*, tried on the 23rd of June, 1849." He then says, that, "at the trial, Thomas, Cobbe, and Price all concurred in stating that they abjured all prayer; that they considered that the day of grace was past, and that the day of judgment had arrived; that they made no distinction between Sunday and any other day; and that they and the other residents in the establishment, male as well as female, did as they pleased on Sundays, and enjoyed healthful exercises, and, amongst others, played at 'hockey;' and that a building, which had previously been a chapel, had been converted into a residence."

Mr. Thomas himself has made two affidavits, in which respectively these passages will be found:—"I and others at the Agapemone amuse ourselves in various ways, both for health and exercise, and we sometime since did so with 'hockey,' which is a game like football, and we do so on Sundays and other days; that I do not regard one day more than another, but every day alike, and each day unto the Lord. The said Henry James Prince has not, to my knowledge or belief, propounded any blasphemous or irreligious doctrines; and I solemnly deny that he teaches his followers that he has a divine character, and is a proper object of worship, or that his followers treat him as a proper

object of worship; I say, that the said Henry James Prince and I, and many of those called in the petition his followers, were pre-eminently distinguished as men of prayer; but, as the consequence of holding that the day of grace is past, and the day of judgment commenced, the said Henry James Prince, and I, and others of his friends, discontinued the use of prayer as a means of communion with God, although I maintain that I am still in intimate communion with Him."

In such a case, there being probability or certainty as I have said, that a sufficient provision for the maintenance and education of this boy is, or will be made, independently of his father's resources—it appears to me, that, consistently with the law of England as declared and enforced in the Court of Chancery since and before the time of Lord *Eldon*, as well as in more than one important case by Lord *Eldon* himself, I cannot decline interfering to avert from the country the infliction of such a citizen, and from the child such ruin temporally, and such spiritual peril, as his father's threatened care must, I think, without a miracle, produce.

I make an order therefore substantially, though not in words, such as that asked by the petition.

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An award was made upon a submission, not under the statute of William 3, between two parties in difference, on which one of the parties obtained judgment against the other party in an action at law. The unsuccessful party filed a bill against the successful party and the arbitrator, to set aside the award:—*Held*, that, whether the award was or was not impeachable on equitable grounds, yet, inasmuch as there was no evidence to raise suspicion that the arbitrator had acted corruptly, partially, or unfairly, he ought not to have been made a party to the suit; and the bill was dismissed as against him, with costs, before the Court had come to any opinion for or against his award.

Under a submission, not made under the statute of William 3, the parties in difference and their arbitrators, who had not agreed, met before the umpire. One of the parties in difference then left, having authorised his arbitrator to act for him in the conduct of the proceedings before the umpire, and the hearing finally terminated, except that it was agreed that one of the parties in difference should, on the following day, go alone to the umpire, and produce a voucher for certain charges, which that party accordingly did. The umpire made his award for a certain sum, which the latter party recovered in an action at law against the other party, thus establishing the legal validity of the award. Upon a bill, by the defendant at law, to restrain the action and to set aside the award—*Held*, that the arbitrator of the plaintiff in equity had been sufficiently constituted to act in the umpirage for him; and that he had power to, and did, sufficiently waive all objection to the irregularity; and the award, being valid in law, was not set aside.

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BY an agreement, dated the 20th of March, 1847, and entered into between Alfred Hamilton of the one part, and John Bankin of the other part, it was agreed that John Bankin should plough certain lands and certain other works on a farm called the Riddens, consisting of about fifty acres, belonging to Alfred Hamilton; and that, after the works were done, if John Bankin should take a lease of the farm, he should not be allowed anything on account of those works; but that, if John Bankin should not take a lease, then, that Alfred Hamilton should pay to him a reasonable sum for the labour bestowed and works done upon the farm; and it was further agreed, that, in case any disagreement should arise between them as to the amount to be paid for the works, each party should name a referee; and that, if the referees could not agree, they should appoint an umpire.

Bankin performed the works according to the agreement, but elected not to take a lease.

In consequence of a disagreement as to the amount to be paid by Hamilton to Bankin on account of the works, the matter was referred. Mr. Bankin, in December, 1847, appointed Mr. Matson, a farmer and valuer, as his referee; and in January, 1848, Mr. Hamilton appointed Mr. Boards, a farmer and valuer, as his referee. The value of the works done was assessed by Mr. Matson at 350*l*.; whilst

Mr. Boards assessed the works at 250*l.* only. The referees being unable to agree, they, on the 31st of May, 1848, appointed Mr. Beadel, an auctioneer and valuer, as umpire.

A meeting took place by appointment at the White Hart Inn, at Romford, on the 22nd of June, 1848, for the purpose of proceeding with the reference, the two referees, the umpire, Mr. Hamilton, and Mr. Bankin being present, when the reference was proceeded with; and it was arranged that Mr. Beadel should look over the farm, with the assistance of the two referees; and that all the parties should, after the inspection should have been made, return to the inn and proceed with the arbitration; but Mr. Hamilton stated, that he should not attend again on that day. The proposed inspection of the farm was made, after which, but before the parties returned to the inn, Mr. Boards called upon Mr. Hamilton, and had some conversation with him. All the parties subsequently on the same day met again, except Mr. Hamilton; but Mr. Boards stated, that he was authorised to examine witnesses on behalf of Hamilton.

Witnesses were then examined, and vouchers produced; and it was understood that the case was proceeded with, so as to enable Mr. Beadel to make his award, except that one or two points were unexplained by Mr. Bankin, who stated he could clear up these points by means of his farm books; and as he could not then produce them, it was arranged between and understood by the parties present that Mr. Bankin should call alone on Mr. Beadel, on the next day, and produce the books to him for that purpose. Accordingly, Mr. Bankin, on the following day, brought the books to Mr. Beadel at his residence in Chelmsford; and Mr. Beadel examined them.

Mr. Beadel made his award on the 26th of June, 1848; and thereby declared Mr. Bankin to be entitled to be paid the sum of 298*l.* 1*s.* 6*d.* by Mr. Hamilton.

Mr. Hamilton was, on the 29th of June, 1848, for the

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first time, informed of these proceedings. Mr. Hamilton having refused to pay anything to Mr. Bankin, the latter brought an action on the award against Mr. Hamilton. Under these circumstances, Mr. Hamilton instituted the present suit against Mr. Bankin and Mr. Beadel, and by his bill prayed that the award made by Mr. Beadel might be set aside, as having been irregularly and improperly made; and that Mr. Bankin might be restrained from prosecuting the action against him upon the award; and a motion was made for an injunction in the terms of the prayer of the bill: but the Court declined to interfere, except to restrain execution issuing upon the judgment, if any, to be obtained in the action.

The action on the award proceeded, and Mr. Bankin obtained judgment for the sum of 298*l.* 14*s.* 6*d.*, the sum awarded to be due to him.

In the meantime, Mr. Hamilton brought his action against Mr. Bankin for the use and occupation of the farm, but failed to obtain a verdict.

By a subsequent order made in the cause, execution upon the judgment for 298*l.* 14*s.* 6*d.* was stayed, on Mr. Hamilton's bringing that sum into Court, which he did.

In addition to the circumstances above stated, it appeared, by the evidence of Mr. Boards, that, although he had authority to appear for Mr. Hamilton on the reference, he had no specific authority from him to consent to Mr. Beadel's seeing Mr. Bankin alone; but that, as he had a general authority from Mr. Hamilton to proceed in the reference, he had consented thereto, in the belief that he had authority to do so.

The cause now came on for hearing.

Mr. *Russell* and Mr. *Charles Hall*, for the plaintiff, said, that this was a suit to set aside an award not made under

the statute of 9 & 10 Will. 3, c. 15 (a), and submitted, that the interview between the defendant and Mr. Beadel alone, which was so irregular a proceeding that it cannot be assumed that Mr. Boards had any authority to consent to it; and that an award made under such circumstances was void: *Walker v. Frobisher* (b), *In re Hick* (c), *Harvey v. Shelton* (d), *Dobson v. Groves* (e), *Re Plews* (f).—They also submitted, that Mr. Beadel had acted improperly in his office of umpire; and that he was liable to the costs of the suit, and therefore had been properly made a party: *Lingwood v. Croucher* (g). *Harvey v. Mount* (h) applies to a solicitor, but the decision is in principle equally applicable to an arbitrator or umpire.

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At the conclusion of the argument for the plaintiff—

The VICE-CHANCELLOR said:—

I can dispose at once of two portions of this case. Although the legal validity of the award has been established, it may or may not have been erroneous; it may or may not be successfully impeached in equity. But no evidence has been laid before me, that induces me to suspect that Mr. Beadel acted corruptly, partially, or with any fraudulent or unfair intention. This being so, I am of opinion that he ought not to have been made a party to this suit; and that the bill must be dismissed, as against him, with costs, without stating or intimating any opinion for or against the award. As to the costs in the action at law, it may or may not be a duty incumbent on this Court to

(a) As to the distinction between awards made under the statute and not under the statute, and the jurisdiction of the Court to set aside an award upon a bill, see *Russ. on Arb.* p. 666.

(b) 6 Ves. 70.

(c) 6 Taunt. 94.

(d) 7 Beav. 455.

(e) 6 Q. B. 637.

(f) *Id.* 845.

(g) 2 Atk. 395.

(h) 8 Beav. 439.

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set aside the award; but I am of opinion that the defence to the action was litigious and vexatious; and that the costs at law, whatever may become of the award here, ought to remain where they are, namely, with the successful litigant in the action.

Mr. *Wigram* and Mr. *Nichols* for the defendant Bankin. —It was no irregularity for the umpire to see Mr. Bankin, for the mere purpose of producing a document to him, in the absence of the other parties: *Hewlett v. Laycock* (a), *Anderson v. Wallace* (b). And if there has been any irregularity, the plaintiff must be held to have waived it by the previous consent of his agent, Mr. Boards: *Hall v. Lawrence* (c), *Bignall v. Abrahams* (d), *Re Tunno* (e).

Mr. *Swanston* and Mr. *Bigg* were for the defendant Beadel.

Mr. *Russell* replied.

The VICE-CHANCELLOR:—

This bill was filed to set aside, on equitable grounds, an award made under the statute of William, which a Court of law has decided to be legally valid. Now, as to the grounds upon which (whether strictly in issue or not in issue on this record) the plaintiff asks to have the award set aside, there are some that clearly fail. Corruption there is none, fraudulent or unfair intention there is none. If there has been mistake, it has been honest mistake; if miscarriage, it has been honest miscarriage. The plaintiff's case has wholly failed as to any alleged irregularities, with the exception of the adjournment to Chelmsford, and the examination of the defendant Bankin by the

(a) 2 Car. & P. 574.

(b) 3 Cl. & F. 26.

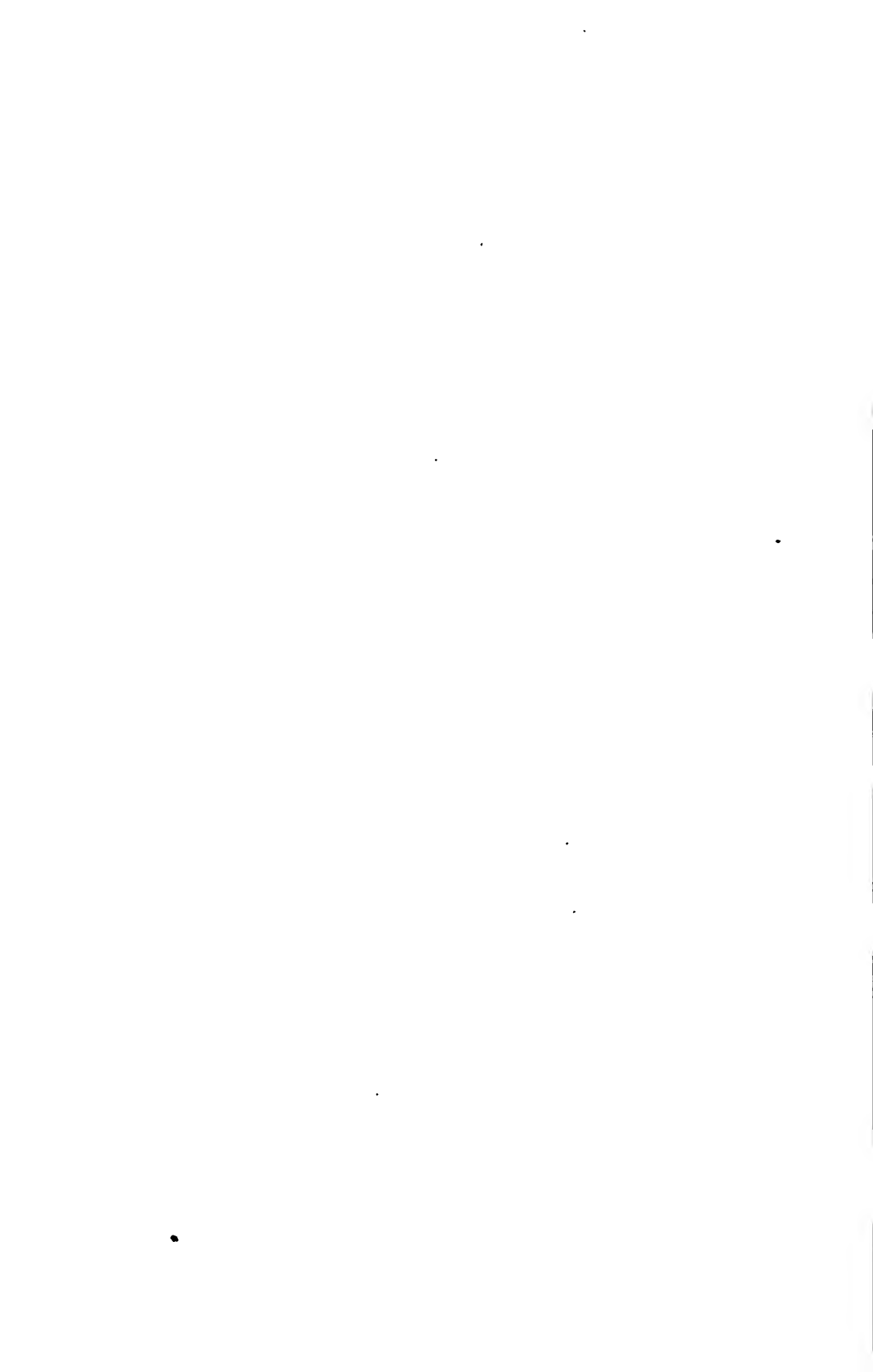
(c) 4 T. R. 589.

(d) 1 B. & P. 175.

(e) 5 B. & Ad. 488.

umpire; and to those points the case is reduced. With regard to the regularity of the adjournment to Chelmsford, I am of opinion that the plaintiff's case is none; for, if he was not present by himself or his agent sufficiently authorised, until the conclusion of the second meeting on the 22nd, that must be considered as attributable to his own choice; and it is not competent to him to allege his absence effectually against his opponent. Whatever was done at that meeting, I must hold, for the purposes of this cause, to have been done with the consent, or as effectually as in the presence, of the plaintiff. If he was not there, he ought to have been there. The adjournment to Chelmsford, in my judgment, bound the parties. Then comes the question, whether that which took place at Chelmsford, namely, the examination, in a certain sense, of the defendant, no person being present on the part of the plaintiff, was materially irregular. I decline to give any opinion how that part of the case would have stood, even upon such a matter as a valuation of this kind, had the view which I take of the conduct of Mr. Boards, the referee appointed by the plaintiff, been different from what I am about to state. I am of opinion, that, from the whole of the evidence, including particularly the visit to the plaintiff by Mr. Boards, after the return from the inspection of the farm, and before the resumption of the business at the inn on the 22nd, the just inference is, that Mr. Boards was the plaintiff's agent for the purpose of the residue of the business of the umpirage; and that Mr. Boards had power to acquiesce, and did acquiesce, in the course agreed to be taken, which was on the following day taken at Chelmsford. The consequence is, that in my opinion not any valid objection in equity has been established to this legal award, and the bill must be dismissed with costs.

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I N D E X

TO THE

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ABROAD.

See COSTS, 1.

ABSENTING.

See ACT OF BANKRUPTCY, 3.

ACCEPTANCE OF SHARES.

See CONTRIBUTORY, 1.

ACCOUNT.

See EVIDENCE, 2.

ACCUMULATION.

1. A testator devised estates to trustees for ninety nine years, upon trust, during twenty-one years, and so much longer during the life of his only son as there should be in existence any younger children or child of his son, to raise 2000*l.* per annum, and to invest and accumulate this annual sum, and stand possessed of it and the accumulations, upon certain trusts thereby declared, being trusts for the son's younger children; and, subject to the term, the estates were devised to the use of the son for life, with remainder to the use of his first and other sons successively in tail,

with remainders over:—*Held*, that the trusts for accumulation were valid, being a provision for raising portions within the exception in the Thellusson Act. *Beech v. Lord St. Vincent*, 678

2. A testator devised estates, on trust, to pay the rents to a tenant for life; and after her death, on trust, to accumulate the same for twenty-one years from the death of the tenant for life, and, at the end of that period, to divide the accumulations among defined classes of objects, and with limitations in remainder after the expiration of the twenty-one years, but no residuary devise:—*Held*, that the time of distribution was not accelerated by the operation of the Thellusson Act; but that the rents accruing between the end of the legal period for accumulation and the time of distribution belonged to the heir-at-law of the testator. *Nettleton v. Stephenson*, 366

ACTION.

See DISMISSAL.

ACT OF BANKRUPTCY.

1. A declaration of insolvency followed by a fiat within two months,

held to be an act of bankruptcy sufficient to support another fiat issued after that period, on the annulling of the former fiat. *Ex parte Hunt*, 572

2. A fiat was sued out, founded on an omission to pay or secure a debt according to the 1 & 2 Vict. c. 110, s. 8, which enacts, that such omission shall constitute an act of bankruptcy, provided a fiat shall issue within two months after the default. The fiat was not sued out by the creditor who made the affidavit of debt, and was afterwards annulled for want of prosecution. A second fiat then issued after the expiration of the two months: *Held*, that the failure to pay, &c., constituted a sufficient act of bankruptcy to support the second fiat. *Ex parte Parker*, 575

3. A trader, on a dissolution of partnership, left at the place of business a direction that letters were to be addressed to him at a particular post-office, at a shop. The continuing partner afterwards instructed a solicitor to call a meeting of creditors; and the solicitor notified this to the retired partner, who neither sanctioned the meeting nor attended it:—*Held*, that neither of these omissions constituted an act of bankruptcy. *Ex parte Addison*, 580

ADMINISTRATION.

An intestate had stock in the funds to a very large amount. No next of kin appeared to claim administration, which was taken out by the solicitor to the Treasury. The administrator, after several years had elapsed without any claim being substantiated, sold out the fund, and paid the proceeds into the Treasury. Afterwards, the next of kin appeared and substantiated their title in a suit in Chancery:—*Held*, that the administrator, on paying over to them the proceeds of the stock, must also pay interest at

AMENDING.

4l. per cent. from the time when the stock was sold out. *Turner v. Maule*, 497

See ELECTION, 2.
EXONERATION.

AFFIDAVIT.

1. Where a petition, and the affidavits in support of it, had been wrongly intitled, and the petition had been amended under an order, the Court allowed the affidavits to be taken off the file to be amended. *Ex parte Burton*, 578

2. The circumstance of the affidavit in support of a petition for adjudication being sworn before a Master Extraordinary in Chancery, who was the solicitor of the petitioning creditor,—*held* not sufficient ground for annulling the adjudication. *Ex parte Caldwell*, 664

AGENT.

See CONTRIBUTORY, 32.
WINDING-UP ACTS, 27.

AGREEMENT.

See SPECIFIC PERFORMANCE.

ALLOTTEE.

See CONTRIBUTORY, 1, 2, 3, 4.
WINDING-UP ACTS, 1.

AMENDING.

A petition of one of the bankrupts to annul the fiat was wrongly intitled:—*Held*, that the Court might, after the expiration of twenty-one days from the insertion of the advertisement, permit the title to be amended, and the petition to be served on the other bankrupt; and that these steps did not render the amended petition a new proceeding, so as to be precluded

ANNULLING FIAT.

by the lapse of the twenty-one days.
Ex parte Lord, 607

ANNUITY.

1. Leaseholds were bequeathed upon trust, out of the rents and profits to pay an annuity of 52*l.*, for the life of the annuitant, and, "subject and without prejudice to the annuity," were bequeathed upon other trusts, but without any trust for sale. They were purchased by a Railway Company under the provisions of the Lands Clauses Consolidation Act, and the proceeds paid into Court; but the income was insufficient to keep down the annuity:—*Held*, that portions of the corpus ought to be sold from time to time to satisfy the growing payments. *Ex parte Wilkinson*, 633

2. Documents of title were deposited, with a written memorandum expressing that they were deposited to secure an annuity, also secured by bond. The bond was enrolled but not the memorandum. The Court declined to direct a sale of the property comprised in the security. *Ex parte Miller*, 553

ANNULLING FIAT.

1. The circumstance of a person against whom a fiat has issued being abroad, does not justify a special petition to annul for want of prosecution, as an *ex parte* application may be made to dispense with his signature. *Ex parte Ward*, 579

2. *Quære*, whether an application to annul a fiat for equitable invalidity should not be made to the Commissioner in the first instance? *Ex parte Brierly*, 646

3. Petition of a petitioning creditor to annul the fiat, on the ground that his debt had been miscalculated, and was insufficient to support the fiat, dismissed with costs, the bank-

ARRANGING DEBTOR. 791

rupt opposing, and the assignees not consenting to it. *Ex parte Leonard*, 624

See AFFIDAVIT, 2.
AMENDING.
COSTS, 4.

APPEAL

See CONTRIBUTORY, 31.
PROTECTION.

APPEARANCE

See INJUNCTION, 5.

APPORTIONMENT.

See POWER, 1.

ARBITRATION.

See AWARD.

ARRANGING DEBTOR.

1. Upon the hearing of a petition of an arranging debtor to a Court of Bankruptcy for a certificate, that a deed of arrangement has been duly signed by the requisite majority of creditors, the Court ought to permit relevant questions to be put to the debtor by any creditor; and where the Court had declined to give this permission, the certificate was discharged upon appeal. *Ex parte Mortimer*, 649

2. An arranging debtor made the statutory affidavit, that he had assets ready to be produced, to the amount of 200*l.* On being examined, the only account he could give of those assets shewed, that he had some property abroad, and certain rights in reversionary property in this country, but which did not seem capable of realisation:—*Held*, to be shewn that the affidavit was wilfully untrue, and that the Commissioner had properly adjudicated the arranging debtor a

bankrupt, although no creditor had intervened. *Ex parte Edwards*, 625

ASSETS.

See EXECUTOR.
EXONERATION.
GOODWILL.

ASSIGNEES.

See CERTIFICATE, 2
CONTRIBUTORY, 5, 6.
OFFICIAL ASSIGNEE.
SOLICITOR.
WINDING-UP ACTS, 25.

ATTESTATION.

See WILL, 1.

AWARD.

An award was made upon a submission not under the stat. of Will. 3, between two parties in difference, on which one of the parties obtained judgment against the other party in an action at law. The unsuccessful party filed a bill against the successful party and the arbitrator, to set aside the award. *Held*, that, whether the award was or was not impeachable on equitable grounds, yet, inasmuch as there was no evidence to raise suspicion that the arbitrator had acted corruptly, partially, or unfairly, he ought not to have been made a party to the suit; and the bill was dismissed as against him with costs, before the Court had come to any opinion for or against his award.

Under a submission, not made under the stat. of Will. 3, the parties in difference and their arbitrators, who had not agreed, met before the umpire; one of the parties in difference then left, having authorised his arbitrator to act for him in the conduct of the proceedings before the umpire, and the hearing finally terminat-

ed, except that it was agreed that one of the parties in difference should, on the following day, go alone to the umpire, and produce a voucher for certain charges; which that party accordingly did; the umpire made his award for a certain sum which the latter party recovered in an action at law against the other party, thus establishing the legal validity of the award. Upon a bill by the defendant at law, to restrain the action, and to set aside the award:—*Held*, that the arbitrator of the plaintiff in equity had been sufficiently constituted to act in the umpirage for him; and that he had power to, and did sufficiently, waive all objection to the irregularity; and the award being valid in law was not set aside. *Hamilton v. Bankin*, 782

BANKING COMPANY.

See CONTRIBUTORY, 14, 22, 30, 31.

BANKRUPT.

See AMENDING.
ANNULLING FIAT.
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CERTIFICATE, 1, 2.
CONTRIBUTORY, 5, 6.
PROTECTION.
TRUSTEE, 5.
WINDING-UP ACTS, 25.

BANKRUPTCY.

See ACT OF BANKRUPTCY.

BARON AND FEME.

See HUSBAND AND WIFE.

BENEFICE.

A rector, who was also the patron of a living, gave warrants of attorney to various creditors, who had mort-

gages on the advowson, subject to an agreement that the judgment to be entered up by the first mortgagee should have priority over the rest, whenever execution should be issued:—*Held*, that the agreement pointed so particularly to making the judgments charges on the living, that the Court could not give effect to it by granting an injunction and a receiver. *Long v. Storie*, 308

BILL.

See DISMISSAL.
PLEADING.

BILL OF EXCHANGE.

A bill of exchange thus drawn—“Pay C. & Co. 7500*l.* value of same, which place against coffee per Vigilant:”—*Held*, not sufficient to give a lien on the coffee for the amount of the bill. *Ex parte Carruthers, Re Higginson*, 570

See VENDOR AND PURCHASER, 6.

BOND.

A partner in a bank gave a bond to his sister in performance, as it was alleged, of a promise voluntarily made to their father on his death-bed. The sister died, having specifically bequeathed the sum secured by the bond. The bankrupt gave the legatees fresh bonds for sums amounting together to the sum secured by the original bond, in consideration of the delivery up of that instrument. Six years afterwards, the partners in the bank, including the obligor, became bankrupt; and it appeared, that, at the times of both the transactions, the firm must have been insolvent; and that the obligor must have then known or suspected this to be the case; but that the transactions were entered into fairly,

and without reference to this circumstance. There was no evidence, however, of any notice or suspicion on the part of the obligees:—*Held*, that they were entitled to prove upon the bonds. *Ex parte Hookins, Re Gundry*, 549

See INJUNCTION, 3.

TRADER DEBTOR.

BONUS.

See INFANT, 2.

BUILDER.

See TRADING.

BUILDING SOCIETY.

See PARTIES, 3.

CALL.

See PROOF, 1.

SHARE.

CERTIFICATE.

1. An attorney employed to receive money and pay it to the client's account, paid it to his own; and, on the client bringing an action, vexatiously defended it, and filed a bill (which was dismissed) to restrain execution. He was afterwards found bankrupt as a scrivener:—*Held*, that the conduct of the bankrupt was not conduct as a scrivener, so as to be capable of being regarded in reference to the allowance of his certificate. *Ex parte Spicer*, 601

2. Assignees may oppose the certificate without giving notice. *Ex parte Wells, Re Wells*, 645

See ARRANGING DEBTOR, 1.

SURRENDER.

CHARGE.

See EVIDENCE, 2.

VENDOR AND PURCHASER, 5.

CHARITY.

A testatrix gave a legacy to trustees, upon trust, to apply the income to the providing each of the poor inmates of a Poor-law Union Workhouse, above the age of sixty years, with one pint of porter, more or less, according to the number. Upon an information by the Attorney-General, the executors and parties beneficially interested, including infants, not opposing, the Court ordered that the income should be paid to the vicar of the parish constituting the Union, to be applied by him according to the will in a manner consistent with the Poor Law Amendment Act and the orders of the Poor Law Commissioners. *Attorney-General v. Vint*, 704

See MORTMAIN ACT.

CHEQUE.

Where a suit was instituted for the delivery up of a cheque, given as part of the consideration for a purchase, which was alleged to have been rescinded, and it appeared that the cheque was post-dated and not stamped, the Court, on that ground, refused to interfere. *Carrington v. Pell*, 512

CLERK.

Where a clerk assisted his master in perfecting an invention, for which a patent had been obtained, upon an agreement to be paid out of the profits, but which agreement had no reference to his duties as clerk: *Held*, that he was not precluded from proving for his remuneration as a clerk, or from receiving three months' salary in full. *Ex parte Hickin, Re George Ellins*, 662

CODICIL.

See WILL, 8.

COMMITTEE.

See LUNATIC.

CONTRIBUTORY.

COMMITTEE-MAN.

See WINDING-UP ACTS, 1, 4.

COMMITMENT.

See CONTRIBUTORY, 17, 18, 19, 20, 21.
WINDING-UP ACTS, 24.

CONFLICT OF LAW.

See WINDING-UP ACTS, 9.

CONSTRUCTION.

See POWER, 2,
SETTLEMENT, 2,
WILL.

CONTINGENT DEBT.

See PROOF, 2, 3.

CONTRIBUTORY.

Allottee.

1. A publisher, furnishing a provisionally registered Company with goods, agreed with the chairman to be paid in shares, but so that he should incur no personal liability. Scrip certificates were sent to him accordingly; and the Company was afterwards completely registered. He sold the shares. On being required to sign the deed, he refused to do so, and took no further part in the affairs of the Company:—*Held*, that he was properly excluded from the list of contributories. *Woodfall's case, Re Universal Salvage Company*, 63

2. An application for shares in a provisionally registered projected Company was made on Oct. 20th, 1845. No answer was returned till Dec. 15th, when a letter of allotment was sent to the applicant, who took no notice of it. The circumstances of the projected Company had considerably changed in the interval. On an appeal from the decision of the Master, placing the applicant on the list of contributories, an issue was di-

rected, to try whether the allotment was made *bonâ fide*; and a verdict having been found in the negative, the applicant's name was removed from the list.

Semble, that the circumstance of some persons being advertised as provisional directors without their consent, is not sufficient ground (no fraudulent intent being proved) for removing from the list of contributories an allottee who was induced by the advertisement to apply for shares. *Mathew's case, Re Direct Exeter, Plymouth, and Devonport Railway Company*, 234

3. An allottee, who had paid his deposit on shares in a Company which was afterwards completely registered, claimed to be excluded from the list of contributories, under the Joint-Stock Companies Winding-up Act, 1848, on the ground that a condition expressed on the scrip certificate, that the capital should be 10,000*l.* in 4000 shares, had not been fulfilled, and that 2600 shares only had been subscribed for:—*Held*, that this was not sufficient ground for his exclusion.

On an appeal from the Master as to the insertion of a name on the list of contributories, it must be assumed that the Company is within the Winding-up Act.

The proper mode of disputing that proposition is by an application to discharge the order for winding up the Company. *Sharpus's case, Re Universal Salvage Company*, 49

4. It is not sufficient ground for excluding an allottee from the list of contributories to a provisionally registered Railway Company, that the prospectus of the Company contained incorrect and fraudulent statements, in reliance on which he applied for shares, or that the project was never carried into effect, unless it appear that the only other persons interested in the Company were the persons who made the fraudulent statements. *Parbury's*

case, Re Direct London and Exeter Railway Company, 43

Assignee.

5. The official assignee of a bankrupt shareholder of a Company paid, out of the bankrupt's estate, calls becoming due on the shares after the bankruptcy; and the creditors' assignees, in the usual course of business, signed memoranda vouching the accuracy of the official assignee's accounts, containing entries of the payments of the calls:—*Held*, that the surviving creditors' assignee had not thereby rendered himself liable to be placed on the list of contributories in his own right as member by survivorship. *Stone's case, Re German Mining Company*, 220

6. The deed of settlement of a Company provided, that, in the event of the bankruptcy of a shareholder, his assignees should not be entitled to hold his shares without giving notice. It also enabled the directors, in the same event, to declare the shares forfeited, and provided, that, in the meantime, the bankrupt's estate should be liable, so far as the law would allow, to the payment of calls. On winding up the Company under the Joint-stock Companies Winding-up Act, 1848:—*Held*, that the names of the assignees of a bankrupt shareholder were properly inserted in the list of "contributories" in their character of assignees. *Kuper's Assignees' case, Re Kollmann's Railway Locomotive and Carriage Improvement Company*, 113

Depositee.

7. Shares were deposited by the allottees with creditors as security, and having been called in were exchanged by the creditors for others in their own names. The fact, that they held the shares as security only, was known to the directors of the Company. Upon the Company being wound up:—*Held*, that the creditors had been pro-

perly placed in the list of contributories in respect of the shares. *Price and Brown's case, Re Patent Elastic Pavement and Kamptulicon Company*, 146

Devisee.

8. A shareholder in a Joint-stock Company bequeathed his personal estate to his wife for life, and, after her death, to his daughter absolutely, (subject to certain payments;) and he appointed his wife and daughter his executrices, and devised to them real estate.

The widow received dividends on the shares, and died; and afterwards, on the Company being wound up under the Winding-up Acts, the daughter and her husband were placed on the list of contributories, in right of the daughter as executrix of her father:—*Held*, First, that a call was properly made upon the daughter and her husband, payable out of the testator's personal assets, whether the conduct of the executrices, in suffering their testator's assets to remain in the Company was a breach of trust or not.

Secondly, on it appearing that the personal assets had been fully administered—*Held*, that she and her husband could not be put on the list in respect of her being devisee. *Case of Hamer's Executors, Re St. George's Steam Packet Company*, 279

But see *S. C.*, on appeal, 2 D. M. & G.

Executor.

9. The executrix of a deceased shareholder in a Joint-stock Banking Company received dividends on shares vested in him, from his death in 1842 till 1846, when the affairs of the Company became embarrassed; but she was not required by the directors to execute the deed of settlement according to the provisions of that document, nor did she execute it:—*Held*, First, that, as she participated in the profits, it was unreasonable to attribute to her and the directors an intention that

she was not to be liable to contribute to the losses in some manner.

Secondly, That the receipt of the dividends was sufficient evidence that she had contracted with the directors to be a contributory.

Thirdly, That the directors were competent to make such contract. *Sed quære* whether she should be a contributory personally or as executrix. *Gouthwaite's case, Re North of England Joint-stock Banking Co.*, 258

Forfeiture.

10. The deed of settlement of a Company purported to be made between persons referred to and described as being named in a schedule, of the first part; and persons named and described, of the second and third parts. There was no schedule to the deed, which, however, was executed by numerous persons besides those of the second and third parts. One of the clauses authorised the directors to declare forfeited the shares of any party to the deed who did not execute it; and another clause directed, that, on a transfer, the transferee should take on himself the antecedent liability of the transferor. An allottee of shares paid his deposit and some calls, but did not execute the deed. The directors declared his shares forfeited, and carried them to the Company's share account, and he submitted to the forfeiture. On the affairs of the Company being, several years afterwards, wound up, under the Joint-stock Companies Winding-up Acts, the Master excluded the allottee from the list of "contributories," holding that he was virtually a party to the deed, so as to enable the directors to forfeit his shares under its provisions; and that the forfeiture relieved him from the responsibility in respect of losses accruing before it was declared. The Court, on appeal, affirmed the decision. *Beresford's case, Re Kollmann's Locomotive and Carriage Improvement Co.* 175

Husband and Wife.

11. The deed of settlement of a Company prescribed certain preliminaries, which were to be observed for the purpose of making the husband of a female shareholder a proprietor in the Company:—*Held*, that a husband, who had not complied with these requirements, was liable in respect of losses incurred during the coverture, but not liable in respect of any incurred before the inception or after the determination of the coverture, notwithstanding expressions used by him, in corresponding with the secretary of the Company, alluding to the shares as his. *Kluhl's case, Re The Vale of Neath Brewery Company*, 210

12. The deed of settlement of a banking Company provided, that no shares should be transferred while any call directed to be paid remained due on them; and that any transfer contrary to the deed should have no validity either at law or in equity. A legatee of shares, on which a call was due, took a transfer of them from the executors by a deed, to which an officer of the Company was a party. The legatee applied for dividends on the shares; but the officer of the Company refused payment until the call was paid up. The legatee never paid the call. She afterwards married, and neither she nor her husband ever paid or received anything on account of the shares, nor did anything further in respect of them. On the affairs of the Company being wound up nine years afterwards:—*Held*, that the husband was properly placed on the list of contributories; but it was referred back to the Master to consider whether his name ought to be inserted without that of his wife. *Sadler's case, Re North of England Joint-stock Banking Company*, 36

13. By the deed of settlement of a Company the husbands of female shareholders might become proprietors, with the approbation of the di-

rectors. But husbands, who did not apply for or obtain such approbation, were within six months after their marriage to sell their wives' shares, and, on refusal or neglect so to do, were to forfeit the shares for the benefit of the Company. The deed also provided, that, if the husband of a female proprietor did not obtain the approbation of the directors to be admitted a proprietor, the directors might, and were required on the application of the husband to, purchase for the Company the shares from him, at the market price, or such price as they should consider reasonable. The husband of a female shareholder attended a meeting and proposed resolutions thereat. He afterwards applied to the directors to be relieved from his wife's shares; and the directors agreed to purchase them, on the husband making an advance to the Company, and taking debentures for the price of the shares, and for the advance. The sale was completed on these terms, within six months after the marriage:—*Held*, that the transaction was valid, and that the insertion of the husband's name on the list of contributories to the Company was properly qualified by restricting his liability to a period preceding the sale. *White's case, Re Vale of Neath and South Wales Brewery Co.* 157

14. A female shareholder in a Joint-stock Bank married, and her husband received dividends on her shares, signing the dividend warrants per procuration of his wife:—*Held*, that he was not entitled to be removed from the list of contributories under the Joint-stock Companies Winding-Act, 1848, although he had not fulfilled the conditions prescribed by the deed of settlement, for the purpose of entitling the husband of a female shareholder to become a member of the Company. *Burlinson's case, Re North of England Joint-stock Banking Company*, 18

Infant.

15. By the rules of a Steam Packet Company, shareholders were entitled to a free passage by the Company's vessels; and there were some provisions in the deed of settlement for the event of infants being shareholders. A shareholder in the Company transferred shares to a son, who was not of age:—*Held*, that entries in the Company's books, on the occasion of the son obtaining tickets as a proprietor, for a free passage, describing him as *Master*, did not affect the Company with notice of his minority, so as to discharge the father in respect of the transferred shares; but that, on winding up the Company, the father's name was properly placed on the list of contributories in respect of the shares. *Litchfield's case, Re St. George's Steam Packet Company*, 141

Preference Shares.

16. A subscriber for shares in a Company, on terms of receiving 8l. per cent. on his subscribed capital in lieu of profits, having received a dividend on that footing, cannot effectually resist being placed on the list of "contributories" under the Joint-stock Companies Winding-up Act, 1848, on the ground that the deed of settlement did not authorise the issue of such preference shares. *Hitchcock's case, Re Vale of Neath and South Wales Brewery Company*, 92

Provisional Committee-man.

17. A person who, being applied to to become a member of a provisional committee of a provisionally registered Railway Company, consented by a letter with a postscript, to the effect that the acceptance must be taken subject to his approval of the plans, and that he should be held free from all liability. He afterwards attended a meeting, at which the

managing committee was appointed:—*Held*, that the qualification contained in the postscript was an integral part of the acceptance; and that he was not liable to be placed on the list of contributories. *Roberts' case, Re Direct Exeter, Plymouth, and Devonport Railway Company*, 205

18. The appellant had attended a meeting of the provisional committee of a provisionally registered Railway Company, but took no part in its proceedings, and expressly desired that his name might not be inserted in the books of the Company. Afterwards, upon threats of his name being given up to the creditors of the Company, in order that he might be sued for its debts, he paid, under protest, two sums of 15l. and 50l. demanded from him, to the credit of the Company, as his proportion of certain contributions required from all the members of the provisional committee:—*Held*, that the appellant was not a contributory to the Company under the Winding-up Acts.

It is not of necessity to disbelieve or to attribute error to an affidavit, because the deponent is interested, and because a witness not interested deposes in a different manner; and the Court, believing the whole of the affidavit of an interested deponent, decided the case in his favour, though the testimony of a witness not interested was different. *Hall's case, Re Direct Exeter, Plymouth, and Devonport Railway Company*, 214

19. B. was placed, at his own request, upon the list of a provisional committee of a Railway Company, which was provisionally registered, on an assurance that he would not incur any responsibility, nor be bound to take shares. A managing committee was appointed at a meeting of the provisional committee, at which B. was not present. The secretary subsequently, in pursuance

of a resolution of the managing committee, offered shares to B., which, by letter, he declined to take, requesting that his name might be withdrawn from the provisional committee. The committee, by resolution, agreed to comply with this request, and B.'s name did not subsequently appear in the published prospectuses. The projected Company was not formed. Heavy liabilities were incurred by the managing committee; and at three meetings of the provisional committee subsequently held, which were attended by B., it was resolved that three contributions, amounting together to 115*l.*, should be paid by each of the provisional committee-men. In compliance with this resolution, B. made three payments, amounting to 115*l.* An order was made for winding up the Railway Company under the Winding-up Acts:—

Held, that even if B. continued to be a provisional committee-man, he was not therefore and merely as such a member of the Company ordered to be wound up; and his name was removed from the list of contributories.

Where an abortive Railway Company has been ordered to be wound up, the provisional committee for forming such Company is not identical with the Company itself. The object of the provisional committee was only to procure the formation of the Company; and although the members of the provisional committee may be liable to contribute interest, they are not, as such, contributories to the Company directed to be wound up. *Beesly's case, Re Direct Ezeter, Plymouth, and Devonport Railway Company*, 224

20. *Held*, that the circumstance of a provisional committee-man never having attended a meeting of the committee was not sufficient to distinguish his case from *Beesly's*, to

which it was in other respects similar. *Holt's case, Re Direct Ezeter, Plymouth, and Devonport Railway Company*, 241

Retiring Director.

21. The deed of settlement of a Joint-stock Banking Company contained a stipulation, that in all cases not provided for by that or any supplemental deed of settlement, the directors might act in such manner as to promote the interests and welfare of the Company:—*Held*, that this clause did not enable the directors to cancel the shares of a retiring director, so as to exempt him from responsibility; but that, on the Company being wound up upwards of ten years after such a cancellation, the retiring director was properly placed upon the list of contributories. *Stanhope's case, Re Borough of St. Marylebone Joint-stock Banking Company*, 198

22. B. was one of the projectors of a banking Company, and concurred in issuing a prospectus containing regulations, one of which was, that a deed of settlement should be prepared. Several meetings of the proposed directors took place, at which B. took the chair, and at which the terms of the deed of settlement were discussed; but, before the deed was executed by any one, disputes arose between B. and other directors; and it was agreed that the former should retire and cease to be a member of the Company. The deed was afterwards executed, at various times, by other members, and contained a clause whereby the parties thereto ratified all acts, contracts, deeds, matters, and things, up to the time of its execution, done, executed, and performed by the directors. After the execution of the deed, the dissolution of partnership between B. and the Company was advertised. On the Company being

wound up several years afterwards:—*Held*, that the ex-chairman was not properly included in the list of contributories. *Busk's case, Re Borough of St. Marylebone Joint-stock Banking Company*, 267

23. Shares in a Joint-stock Company were transferred by the directors to W., a purchaser, irregularly, by entries in the Company's book, and not by allotment or deed, as required by the Company's deed of settlement. In respect of this transfer as a qualification, W. became a director. At the expiration of half a year, and in October, 1841, he became desirous to retire from being either director or shareholder; and at a meeting of the directors with W. it was agreed that the shares should be taken back; and he was repaid the value of the shares by a promissory note, signed, as for the Company, by one director in favour of another, and indorsed to W. The note was ultimately paid, but no transfer was regularly made or executed; W. thenceforth ceased to act as director and to be treated as a shareholder:—*Held*, that the directors had no power to accept the shares back from W., and that W. could not be presumed to be ignorant that they were without that power; and that his name was properly on the list of contributories. *Quære*, whether the Winding-up Acts, 1848 & 1849, do not go beyond devising modes of enforcing liabilities previously existing, and have not created new liabilities? *Walters' Second case, Re Vale of Neath and South Wales Brewery Company*, 244

Transfer.

24. Where, by a deed of settlement of a Company, the responsibility of transferrors of shares is, as between them and the Company, determined by the transfer, their possible

liability to contribute *inter se*, in the event of demands of creditors being enforced against any of them, is not sufficient ground for placing a transferror upon the list of contributories, in a case where no transferror is active in making or supporting an application for that purpose. *Sutton's case, Re Royal Bank of Australia*, 262

25. Twenty-seven shares in a Joint-stock trading Company were assigned by two shareholders to a purchaser in 1842. Notice thereof was given to the secretary in 1843, and he made an entry of the transfers in pencil in the share ledger of the Company. The Company was dissolved in May, 1847, and in August following the secretary perfected in ink the entry which he had so made in pencil; but other formalities required by the Company's deed of settlement to render transfers of shares valid were not complied with. The purchaser, by letter, in 1843, requested that the dividend on his shares should be paid to a specified individual; and a dividend, which was the only dividend then payable, was paid accordingly. Notices of meetings and of other proceedings usually sent to shareholders were regularly sent to the purchaser; and in reply to one of such notices in 1845, the purchaser wrote to the secretary concurring in a proposal then made to sell the Company's place of business, and therewith to pay its liabilities. That letter was recorded in the minutes of the meeting, at which a resolution to the proposed effect was come to:—*Held*, that there was a complete agreement on the part of the purchaser to become a shareholder, and an acceptance of him as such by persons having the management of the affairs of the Company, who were competent to act as they did; and that

the purchaser's name was properly placed upon the list of contributories. *Gordon's case, Re Vale of Neath and South Wales Brewery Company*, 249

26. The deed of settlement of a Joint-stock Company provided, that, until a deed of transfer of any share should be executed by the vendor and the purchaser, and should be delivered to the clerk of the Company, and a memorial of it should have been made, the purchaser should have no part in the profits. A father purchased shares for his son without the privity of the latter, and the vendor was permitted by the Company to execute a transfer to the son in the books of the Company. The son's name was thereupon registered as a shareholder, but he never executed the instrument of transfer, received any dividend, or assented to the transaction, but always repudiated it. On the Company being wound up eight years afterwards:—*Held*, that the estate of the vendor was liable in respect of the shares. *Henessey's Executors' case, Re St. George's Steam Packet Company*, 191

27. In a Joint-stock Company fifty shares belonging to the Company were transferred and accepted by the transferee, and an entry of the transaction was made in the share ledger of the Company. By the deed of settlement certain formalities were to be complied with, without which it was declared that no transfer should have any force either at law or in equity. These formalities had been universally disregarded in the transactions of the Company, and were not complied with in this case:—*Held*, that there must be taken to have been a universal consent to disregard the provisions of the deed in this respect, and that the transferee effectually became a shareholder as between

himself and the shareholders generally. *Walters' case, Re Vale of Neath and South Wales Brewery Joint-stock Company*, 149

28. Forty shares, called "new shares," were purchased by B.'s father, and were, by his direction, transferred into the names of A. and B., without their knowledge. B., after his father's decease, and on becoming his executor, found the certificates of the shares among his father's papers, and, upon the request of the managing director of the Company, sent the certificates to him to be exchanged. Instead of being exchanged they were cancelled, and other shares, being old shares, were transferred, in the Company's books, to A. and B., as upon a sale:—*Held*, that, as to the forty shares, B. was properly excluded from the list of contributories, both in his individual character, and also as representative of his deceased father. *Pim's case, Re St. George's Steam Packet Company*, 11

29. A shareholder in a Brewery Company sold his shares to one of the directors. His solicitor, through whom the sale was effected, had notice that the purchase was made by the director with a view of vesting the shares in the Company, to whom the director transferred them on the same day on which they were transferred to him. The deed of settlement did not authorise the purchase on behalf of the Company:—*Held*, that the shareholder was properly placed on the list of contributories, under the Joint-stock Companies Winding-up Act, 1848, although seven years had elapsed since the transfer, and it had remained unquestioned during the whole interval.

Seemle, that *Monday v. Guyer* and *Wood v. Rowcliffe* are not conflicting authorities. *Richmond's Executors'*

case, Re Vale of Neath and South Wales Brewery Company, 96

30. The manager of a Banking Company, in which he held shares, induced a friend D., living in the country, to subscribe the Company's deed for 100 shares, upon the understanding, of which a minute was entered in the Company's books, that all the shares that should not be transferred by him to other parties, should be transferred for him by the directors, and that he should receive nothing, nor incur any liability in respect of the shares. After disposing of thirty shares, the purchase-money for which was paid to the directors, D., in pursuance of the arrangement, transferred the remainder back to the manager, by assigning them to him and his successors in office. He never received or paid anything in respect of the shares, and, eight years after the last transaction, the affairs of the Company were wound up under the Joint-stock Companies Winding-up Act, 1848:—*Held*, that the effect of the transaction was to hold out D. as a partner, to induce others to become members of the Company; and that he was properly placed on the list as a contributory. *Davidson's case, Re Borough of St. Marylebone Banking Company,* 21

31. Where a person had entered into an agreement for the purchase of shares in a Company, which had been approved of by the Company, and a specific performance of which could have been enforced against him, he was held liable to be placed on the list of "contributories," although no complete or formal transfer of the shares, according to the deed of settlement, was made before the Company stopped payment.

The 7 Geo. 4, c. 46, s. 13, directing executions on judgments against Banking Companies to issue against actual members in priority

to members at the time of the contract, does not of itself, and independently of express stipulation, render a member liable to be placed on the list of "contributories," in respect of liabilities incurred before he became a member.

The time when, for the purpose of being placed on the list, a contributory became a member, is the time when he entered into a binding contract to take shares.

An appellant from a decision placing him on the list of "contributories," need not bring before the Court a person who would be liable if he were not.

The 33rd clause of the Amendment Act of 1849, is retrospective, and in effect, though not in terms, prevents a re-hearing before a *Vice-Chancellor* as well as before the *Lord Chancellor*, after three weeks, although the three weeks had expired before the Act came into operation. *Sanderson's case, Re North of England Joint-stock Banking Company,* 66

32. One hundred shares were sold in one parcel by a broker, for two vendors, of fifty shares each, in a Joint-stock Company. Five of the shares were transferred by deed by one of the vendors to the purchaser, and the purchase-money of the 100 shares was paid to the broker. The purchaser was accepted by the directors as the proprietor of the 100 shares, and his name was entered accordingly in the Company's books:—*Held*, that the 100 shares formed the subject of one contract; and that the whole must be governed by the terms of the deed of transfer of the five shares.

Directors fraudulently inducing a person to become a purchaser of shares in a Company may be personally liable to him; but they cannot be considered, as the agents of the body of shareholders, to commit a fraud of

this kind, nor is such a fraud a valid objection, the purchaser's name being on the list of contributories.—Observations on *Sanderson's case*.—Observations on *Morgan's case*. *Dodgson's case*, *Re North of England Joint-stock Banking Company*, 85

33. The owner of several shares in a Steam-packet Company transferred two of them to his son, by a document which was not executed by the son, nor entered in the Company's books, nor otherwise perfected according to the provisions of the deed of constitution. The son was not aware of the transfer. By a rule of the Company, every proprietor was always entitled to a free passage by the Company's vessels, and the son, on several occasions, obtained certificates from the Company's office that he was a proprietor, which entitled him to a free passage; and he also signed each certificate, and the Company's books, in respect of these certificates, as proprietor, and obtained a free passage accordingly, but he never received dividends, nor did any other act as a proprietor:—*Held*, that the son was a contributory in respect of such two shares. *Maquire's case*, *Re St. George's Steam Packet Company*, 31

34. A widow who, as the executrix and residuary legatee of her late husband, was entitled to shares in a Banking Company, assigned them by deed to a trustee, previously to her marrying again. The trustee did not fulfil the requisitions of the deed of settlement with reference to an assignee of shares becoming a shareholder, but he received the dividends, sometimes signing the receipts "for the executors" of the testator, sometimes "for the trustees of" [the widow by her widow's name]. There was an entry of the assignment in the books of the Company, but it did not appear by whom notice of it had been

given:—*Held*, that the trustee's name was properly placed on the list, but that his liability should be restricted to the time of the assignment; but, on appeal, the *Lord Chancellor* thought that the evidence was insufficient to fix the trustee with liability, and ordered the motion to stand over till the official manager had established his case in a Court of law.

Where the liability is either upon the person placed on the list or on a stranger, it is not necessary for the official manager to bring such stranger to interplead before the Master. *Hall's case*, *Re North of England Joint-stock Banking Company*, 80

See WINDING-UP ACTS.

COPYHOLDS.

See ELECTION, 1.

COSTS.

1. A plaintiff resident abroad, filing a bill to restrain an action brought against him by the defendant inequity, will not be ordered to give security for costs.

A defendant's right to call for security for costs, where the plaintiff is out of the jurisdiction, is not waived or lost by his demurring to the bill before moving. *Watteau v. Billam*, 516

2. Where the general costs of the suit are given to a party by the decree, they include the costs of a special case on which the opinion of a Court of law was taken under a direction in the cause of this Court. *Humphrey v. Grey*, 450

3. Costs, charges, and expenses of and incidental to the sales of the real estates of the testator in the cause were by the decree ordered to be taxed and paid. On making out these costs, charges, and expenses, it

appeared that 340*l.* had been paid for surveying and selling the estates, upon which the fee of taxation of 3*l.* per cent. attached. In order to avoid this fee, a motion was made, all parties consenting, to vary the order, by only directing the Taxing Master to add to the amount of the taxed costs of the plaintiffs any sums which he should find to have been properly paid by them to any surveyor or other person as his charge for valuing or otherwise, in reference to the sales. The Court varied the order accordingly. *Bellas v. Harmer*, 454

4. An order annulling, with costs, a fiat issued against the petitioner, will not be extended to the costs occasioned to him by the issuing of the fiat, other than those of the proceedings under it. *Ex parte Ward*, 580

5. Where the assignor of a legacy put in a joint answer with other legatees, and her assignee a separate answer:—*Held*, that this did not relieve the assigned fund from the assignee's costs; but that the benefit of the joinder of the assignor with the other legatees ought to go to the general estate. *Heywood v. Grazebrook*, 406

See MORTGAGE, 4, 5.

PARTNERS.

PLEADING, 1.

PROTECTION.

PUBLICATION.

TRUSTEE, 5.

WINDING-UP ACTS, 9, 13, 15.

COVENANT.

See PROOF, 3.

CREDITOR.

See WINDING-UP ACTS, 23.

CREDITOR'S SUIT.

A creditor's suit against a personal

DECREE.

representative for the administration of a testator's estate proceeded to replication, when a decree was obtained, in another creditor's suit, against the same personal representative for the same object. After the defendant had given the plaintiff in the first suit notice of the decree, the plaintiff threatened to proceed; and thereupon the defendant, upon a notice of motion, intitled only in the former cause, asked that the proceedings might be stayed. The Court made an order in both suits, granting the injunction, and giving the restrained plaintiff liberty to tax his costs of the first suit and on the motion, and to go in and prove his debt and such costs in the second suit, but declined to direct that the costs should be paid out of the first assets. *Ladbroke v. Sloane*, 291

See EXECUTOR.

CROSS BILL.

See PLEADING, 3.

CROWN.

See ADMINISTRATION.

CUSTODY OF INFANT.

See INFANT, 3.

DECREE.

A decree, pronounced by the Master of the Rolls, had, upon appeal to the House of Lords, been confirmed with some alterations, which the judgment of the House directed to be made therein. Pending the appeal, the cause was transferred to this branch of the Court. Upon a motion that the judgment might be made an order of Court, it was objected, that the decree, not having been made by a predecessor of the Judge in this Court, it was compe-

DEVISE.

tent to the Lord Chancellor alone to make the order asked; but the Court made the order.

Form of such order.

By a judgment of the House of Lords, which was made an order of this Court, the appellant was ordered to pay to a respondent the costs of the appeal, the amount to be certified by the clerk-assistant; he accordingly certified the same at the sum of 704*l.* 19*s.* 10*d.* The Court declined, upon an *ex parte* application, to direct a writ of *fi. fa.* to be issued. However, upon motion on notice, it ordered the appellant to pay the respondent the certified sum of 704*l.* 19*s.* 10*d.*, but without interest or the costs of the application. *Man v. Ricketts*, 446

See EXAMINATION.

VENDOR AND PURCHASER, 2, 4.

DECREE (SALE UNDER).

See VENDOR AND PURCHASER, 1.

DEMURRER.

See COSTS, 1.

INTERPLEADER.

MORTGAGE, 1.

PARTIES, 1, 2, 3.

PLEADING, 1, 3.

WILL, 3.

DEPOSITEE OF SHARES.

See CONTRIBUTORY, 7.

DEPOSITIONS.

See EXAMINATION. •

SERVICE, 2.

DEVISE.

See ACCUMULATION.

EVIDENCE, 1.

EJECTMENT.

805

DEVISEE.

See CONTRIBUTORY, 8.

DIRECTOR.

See CONTRIBUTORY.

PUBLIC COMPANY.

DISMISSAL.

Where a bill had been retained for a year, with liberty to bring an action, and it had been ordered, that, if the plaintiff should not proceed to trial within that period, the bill was to stand dismissed, the Court, upon the plaintiff's application, enlarged the time after it had expired, and after the defendant had applied to have that bill dismissed absolutely. *Swanger v. Gardner*, 696

DIVIDENDS.

Where the joint debts of a bankrupt firm had been paid in full, and monies forming part of the separate estate of one of the bankrupts had been set apart to answer certain unclaimed dividends, but without any specific appropriation to that purpose:—*Held*, that the creditors entitled to the dividends, on claiming them, were entitled to the interest which had been allowed by the bankers in the interval. *Ex parte Woodford, Re John Wilcocks*, 666

See WILL, 7.

DOCUMENTS.

See WINDING-UP ACTS, 23.

DUTY.

See LEGACY DUTY.

EJECTMENT.

See EVIDENCE, 1.

ELECTION.

1. A testator, being seised of copyhold lands, which, on his death, became subject to customary freebench, gave to trustees the residue of his real and personal estate, upon trust to invest the money in the funds, and to receive the dividends thereof, and the rents of his real estate; and, after payment of his debts and testamentary expenses, to pay to his widow during her life the annual sum of 20*l.*, and to pay the residue of such annual produce to his son; and, after his death, the trustees were to hold the said real and personal estate upon trusts for the children of his said son. The will contained the following declaration:—"I empower my said trustees to lease any lands, which they may hold upon the trusts of this my will, for not more than twenty-one years, at rack rents:—*Held*, that, with this power of leasing in the will, the widow was put to her election between the annuity given to her by the will and her freebench.

Observations on *Holditch v. Holditch*, 2 Y. & C. C. C. 22. *Grayson v. Deakin*, 298

2. By articles of partnership the business was, at the death of either partner within the partnership term, to be carried on for the residue of the term, for the mutual benefit and at the risk of the surviving partner and the executors or administrators of the deceased partner. After the decease of one partner, tradesmen supplied goods to the firm; and a decree for the administration of the estate of the deceased partner having been made, they claimed to prove under it for the price of the goods. The claim was rejected:—*Held*, that they had not so elected to proceed in equity as to preclude themselves from suing the executrix at law for the same demand. *Sexton v. Smith*, 694

ENROLMENT.

See ANNUITY, 2.

EQUITY OF REDEMPTION.

See MORTGAGE, 2.

EQUITY TO SETTLEMENT.

See HUSBAND AND WIFE, 2.

EVIDENCE

1. Plaintiffs by their bill sought, as devisees, to set aside a conveyance executed by the devisor. The defendant, by his answer, admitted that the will (which was made after the Wills Act came into operation) was duly proved in the Ecclesiastical Court. By a slip, evidence was not adduced of the execution of the will:—*Held*, that the defect might be supplied; but that the defendant was entitled to require this to be done by an action of ejectment. *Davies v. Davies*, 698

2. Where the accounts of a partnership between two had been carelessly kept, and, after the death of one, the other furnished to the executors of the deceased partner an account current of the partnership dealings, which afforded them the only evidence to charge the surviving partner:—*Held*, that they were entitled to use it for that purpose in a suit instituted by the surviving partner to have the accounts taken, without being bound by the entries on the credit side of the account current. *Morehouse v. Newton*, 307

3. Where a suit was instituted for the delivery up of a cheque given as part of the consideration for a purchase, which was alleged to have been rescinded, and it appeared that the cheque was post-dated and not stamped, the Court, on that ground, refused to interfere.

Under the law of evidence before

14 & 15 Vict. c. 99, a defendant could not have been examined as a witness for a co-defendant in precisely the same interest. *Carrington v. Pell*, 512

See CONTRIBUTORY, 18.

EXAMINATION.

PUBLICATION.

WILL 4.

WITNESS.

EXAMINATION.

After the passing of the Act, 6 & 7 Vict. c. 85, two (of four) trustees of a charity, who were defendants to an information complaining of acts of mismanagement, were examined in chief, by mistake, as witnesses, by the relator without any order for that purpose, instead of being cross-examined. The relator did not tender the depositions in evidence:—*Held*, that, by reason of their examination, no decree could be made against them.

Held, also, that the 32nd Order of August, 1841, did not, in such circumstances, entitle the relator to relief against the remaining trustees.

On a motion made on behalf of the relator, after the cause had been argued, to suppress the depositions of the trustees, it was ordered that they should be suppressed, on the relator entering into admissions, and on the defendants' being permitted to add to their evidence; but, on appeal, the order was discharged, the Lord Chancellor being of opinion, that, even on these terms, the relator could not be relieved from the mistake. *Attorney-General v. Dew*, 488

See TRADER DEBTOR.

EXAMINATION DE BENE ESSE.

See WITNESS.

EXECUTION.

See CONTRIBUTORY, 31.

EXECUTOR.

Where a creditor of a testator obtained judgment against the executor de bonis testatoris, and a decree was immediately afterwards made in a creditor's suit:—*Held*, that the executor was not entitled to an injunction to stay execution on the judgment. *Vincent v. Godson*, 717

See CONTRIBUTORY, 9, 28.

LEGACY DUTY.

PARTIES, 1.

EXONERATION.

A testator had, before his marriage, limited lands to trustees for a term, to secure a debt, and subject thereto to other trustees for another term, to secure an annuity of 100*l.* per annum to his intended wife for life, with a proviso for determining the latter term on his investing a sufficient amount to secure an equal annuity. He died without having made such an investment, having by his will directed payment out of his personal estate of his debts, including what might be charged upon the settled lands; and he bequeathed his residuary estate to his widow. Before his death, he had paid off the debt secured by the first of the above-mentioned terms, which had consequently determined, and the annuity was the only charge upon the estates:—*Held*, that the tenant of the estates was not entitled to have them exonerated as against the widow out of the residue. *Reeve v. Reeve*, 714

FEME COVERT.

See HUSBAND AND WIFE.

FIAT.

See ACT OF BANKRUPTCY.

AFFIDAVIT, 2.

AMENDING.

ANNULLING FIAT.

FORECLOSURE.

See MORTGAGE, 6.

FOREIGN RAILWAY.

See WINDING-UP-ACTS, 9.

FORFEITED SHARES.

See CONTRIBUTORY, 10.

FRAUD.

See CONTRIBUTORY, 32.

HUSBAND AND WIFE, 1.

LACHES.

FREEBENCH.

See ELECTION, 1.

GIFT.

See WILL, 6.

GOODWILL.

The widow and one of the two executors of a surgeon dentist, who alone proved his will very shortly after his decease, by the description of the widow and one of the executors of the deceased, entered into an agreement with a person as his successor, who agreed to give to the widow, her executors, administrators, and assigns 100*l.* yearly for five years, for the goodwill of the business, and for the advantage of an introduction to the patients of the deceased; to pay 100*l.* for the instruments; to take the furniture at a valuation; and to take the house which the deceased held as a yearly tenant, and in which he resided, for the residue of the term therein. The agreement contained

stipulations for the personal exertions of the widow on behalf of the successor. Upon inquiries before the Master in a creditor's suit against the widow for the administration of the testator's estate, it appeared by the affidavit of the successor, that he relied upon the widow's personal exertions; and that, if these were not afforded, he should resist payment of the annuity. By the report the Master did not charge her with the annuity of 100*l.* as part of her testator's assets; but, on exceptions,—*Held*, that the whole, or a part, of the annuity belonged to the estate; and the cause was referred back to the Master to review his report. *Smale v. Graves*, 706

GUARDIAN.

See INFANT, 4.

MORTGAGE, 6.

GUARDIAN AD LITEM.

See INFANT, 1.

HUSBAND AND WIFE

1. Where a husband, before his marriage, had sufficiently early notice that it was intended to settle the bulk of the intended wife's property, and nothing passed to justify a belief, on the husband's part, that, at the time of the marriage, no such settlement had been made:—*Held*, that the husband was not entitled to set aside a settlement, which it appeared had been made before the marriage, although he was no party to it, and was not proved to have been actually cognizant of any settlement having been made. *Wrigley v. Swainson*, *Wrigley v. Wrigley*, 458

2. A husband and wife, by deed acknowledged, demised freeholds of the wife to a mortgagee by way of trust, the trusts being to apply the

rents and profits in payment of certain premiums on insurance, and of the interest on the mortgage debt, and then in reduction of the principal, until it should be paid off. The husband took the benefit of the Insolvent Act:—*Held*, in a suit for redemption instituted by the assignee in insolvency against the mortgagee, that the latter was chargeable with the surplus rents which he permitted to be received by the insolvent's wife for her maintenance, the principles established by *Sturgis v. Champneys* not extending to such a case. But there being ground for supposing that the Court would have made such a provision for the wife, the Court, although the balance was found against the mortgagee, decreed payment without costs. *Clark v. Cook*, 333

See CONTRIBUTORY, 11, 12, 13, 14.

INCOME-TAX.

See PROPERTY TAX.

INCUMBRANCER.

See COSTS, 5.

INFANT.

1. The Court appointed a guardian ad litem to an infant defendant, without his production in Court, upon an affidavit that the infant was only nineteen days old, and a medical certificate that the infant could not be safely produced. *Stutley v. Harrison*, 394

2. A bonus on a policy settled on trusts, under which an infant was entitled contingently on attaining twenty-one, directed, on petition without suit, to be anticipated and applied for maintenance of the infant. *Ex parte Hays, Re Hays*, 485

3. In July, 1845, one of the followers of a Dissenting preacher (who styled himself the Servant of the

Lord), having no property of his own, married another of the sect, who had a fortune of about 5000*l.*, under circumstances leading to the inference that the marriage was brought about entirely by the influence of the preacher. In February, 1846, the wife, having manifested insubordination to the chief of the sect, was deserted by her husband, who, with the chief, and others of his followers, went to reside together at an establishment which they formed, and called "Agapemone." They there professed and acted upon the doctrines that the day of grace had passed, and the day of judgment commenced; and that, by reason thereof, prayer was superfluous and no longer necessary. They also professed and acted upon the doctrine, that no day of the week ought to be set apart as one of peculiar holiness. Shortly after the desertion of the wife she was delivered of a boy, who remained in the care of his mother and maternal grandmother, at the residence of the latter, who properly provided for his maintenance and education. *Held*, a proper case for restraining the father from acquiring possession of the infant. *Thomas v. Roberts*, 758

4. If, independently of the Act of 2 & 3 Vict. c. 54, the Court can exercise jurisdiction upon the petition of a mother having the custody of her infant child, for the continuance of such custody, it may do so, although the petition is intitled in the matter of that Act as well as in the matter of the infant.

Where the mother of an infant under seven years of age, and having custody of it, is living separate from the father, and has a good defence to a suit by him for restitution of conjugal rights, the Court may make an order continuing to the mother the custody of the infant, such a case, al-

though not within the letter, being within the equity of the 2 & 3 Vict. c. 54. *Re Tomlinson*, 371

See CONTRIBUTORY, 15.

MORTGAGE, 6.

SETTLEMENT, 1.

INJUNCTION.

1. The time within which a Railway Company was authorised to take lands expired on the 4th of August, 1848. Long before this period they gave notice to a landowner to treat, and afterwards delivered to the plaintiff, to whom the lands had been in the meantime devised, a bond, and paid the estimated value of the lands comprised in the notice into the Bank under the Lands Clauses Consolidation Act, 1845, s. 80. Under an Amendment Act, the powers of which extended beyond 1848, the Company were authorised to take the land included in the notice; and, on August 3rd, 1848, they gave a notice to the plaintiff, that, in pursuance of the powers of both those Acts, they intended to take the lands. After the 4th of August, 1848, but without taking any further steps under the Acts, the Company entered upon the land. On a motion for an injunction, the Court declined to interfere, on the ground, that, although the Company might not be then entitled to take possession under their compulsory powers, they were able, by some proceeding under the second Act, to obtain the land; and the motion was ordered to stand over, with liberty to the plaintiff to bring an action. *Williams v. South Wales Railway Company*, 354

2. On an application for an injunction to restrain a Railway Company from taking proceedings to summon a jury under the compulsory clauses of the Lands Clauses Consolidation Act, 1845, the Court thought that the plaintiff would have been entitled to an

injunction, but for the circumstance that the time limited for the exercise of the compulsory powers was on the point of expiring; but that the doubt as to the validity of such proceedings after that period, although the usual notice had been given of the intention of the Company to take the land, was sufficient ground for declining to grant the injunction, on the Company undertaking not to act on the result of the jury process without the leave of the Court, and bringing into Court 200*l.* to answer the plaintiff's costs and charges by reason of the process, without prejudice to any question. *Wood v. North Staffordshire Railway Company*, 368

3. A Railway Company, under the powers of the Lands Clauses Consolidation Act, 1845, gave the usual notice of reference to a jury to assess the value of a portion of a house, shop, and outbuildings, which had been occupied together, coffee being roasted in the outbuildings and sold in the shop. They gave a bond to the lessee, her heirs, executors, administrators, and assigns, and paid into Court 600*l.*, the amount at which the value of the buildings taken by them had been estimated, under the provisions of the Act; they then proceeded to enter into possession, and to pull down the buildings. The lessee filed her bill, to which neither the superior landlord nor her sub-lessee was a party, for an injunction to restrain the Company from continuing in possession of the buildings, on two grounds: First, that the buildings taken were part of a manufactory, and could not be taken without the rest; and, secondly, that the bond given was invalid by reason of its being conditioned for payment of the sum specified to the heirs, executors, administrators, or assigns of the lessee. On a motion for the injunction, the Court considered that there was a serious ques-

tion to be tried at law, whether the whole proceedings of the Company had not been illegal; yet, as the only complaining party was not in the occupation of the premises, and was not liable to personal inconvenience pending the litigation at law, and as the Company, in any event, was entitled to take the property, forbore to grant an injunction, upon the Company paying into Court a further sum of 600*l.*, and undertaking to abide by such order as the Court might make as to proceeding before a jury under the notice they had given, and as to the possession of the buildings.

The Court may, upon a motion for an injunction, direct a case for the opinion of a Court of law, although it grants no injunction, but merely directs the motion to stand over, and although the defendant objects to any case being directed. *Dakin v. The London and North Western Railway Company*, 414

4. A Railway Company having begun to divert a turnpike-road, by a crossing on a bridge over their railway with a sharp curve, an information, at the relation of two of the trustees of the road, was filed, praying for an injunction to restrain the Company from interfering with the road until they should have provided another as convenient as the former, or as near thereto as circumstances allowed, as required by the Railways Clauses Consolidation Act, 1845, s. 56.—The Court, holding that the Company were not doing as little damage as could be, granted the injunction, but without prejudice to any application either party might make to the Board of Trade, under the 66th section of the above Act.

In granting such an injunction, the Court cannot point out to the Company what they ought to do, except by stating the reasons which induce the

Court to come to its conclusion, or the manner in which it appears to the Court that that which seems an evil can be remedied. *Attorney-General v. London and South Western Railway Company*, 439

5. A bill, seeking an injunction to stay proceedings at law, was duly answered, without any injunction having been obtained on the original bill; it was then amended, and defendant was served with subpoena to appear and answer on the day following the day on which the eight days from the service of the subpoena expired; the plaintiff obtained, as of course, the common injunction for want of appearance, without affidavit of the truth of the amendments, on the allegation that the defendant, being served with subpoena to appear and answer the plaintiff's bill, had not appeared thereto, although his time for so doing had expired. The writ of injunction was sealed on the same day. On the morning of the same day the defendant entered his appearance, but did not serve notice thereof on the plaintiff's solicitor. On a motion by the plaintiff to extend the injunction to stay trial, and on a cross motion by the defendant to dissolve it:—*Held*, that the injunction had priority over the appearance, and that the injunction so obtained as of course for want of answer to the amended bill was regular, and the common injunction to stay trial was extended. *Eyton v. Mostyn*, 518

See BENEFICE.
CREDITOR'S SUIT.
EXECUTOR.
SOLICITOR, 1.

INQUIRY.
See EVIDENCE, 1.

INSTALMENTS.
See PROOF, 2.

INSURANCE

See PROOF, 3.

INSURANCE COMPANY.

See WINDING-UP ACTS, 6, 7.

INTEREST.

See ADMINISTRATION.

INTERPLEADER, BILL OF.

Where a bill of interpleader stated a case for relief as between two of the defendants, but also set up the claim of a third, which was paramount and adverse to the claims of the two others:—*Held*, that, although this last claim might be one which could not support the bill, the introduction of it did not expose the bill to a successful demurrer on the part of one of the first-named defendants. *Farebrother v. Beale*, 637

INTERPLEADING PARTIES.

See CONTRIBUTORY, 34.

ISSUE.

A proportion of a residue was bequeathed in trust for A., for life, with remainder to his children who should attain twenty-one; but, if he should have no child who attained twenty-one, to B. and her children, in a similar manner. The testator had, after making his will, granted under-leases, and transferred stock in favour of B. and her children. A. and his children filed a bill to set aside these transactions, on the ground that the testator was not, at the date of them, of sound mind. Issues were directed at the hearing.

Before any child of A. attained twenty-one, A. and his children pre-

sented a petition in a suit for the administration of the testator's estate, seeking an advance, out of the capital, of their contingent shares, to enable them to try the issue:—*Held*, notwithstanding the opposition of B. and her family, that the advance ought to be made, on an adult petitioner and his solicitor undertaking to abide by any order of the Court for its replacement, if the trial should be unsuccessful. *Coombs v. Brooks*, 452

JOINT ANSWER.

See COSTS, 5.

JOINT ESTATE.

See PARTNERS.

JUDGMENT.

See BENEFICE.

JURISDICTION.

The Court has jurisdiction to decide upon the validity of the execution of a testamentary power over personality, with reference to the state of the donee's mind at the time of the alleged execution. *Morgan v. Annis*, 461

See ANNULING FIAT, 2.

DECREE.

TRUSTEE, 5.

WINDING-UP ACTS, 27.

LACHES.

In 1822, the owner of a reversion (expectant on a life estate, and subject to incumbrances) sold his reversion so subject. In 1825, the purchaser died, and, in 1830, the tenant for life died. In 1846, the reversioner filed a bill to set aside the sale as having been made at an under-value, but not accounting for the de-

lay:—*Held*, that the length of time afforded such evidence of the validity of the transaction as a Court of justice could not disregard; and, although twenty years had not elapsed since the death of the tenant for life, the bill was dismissed with costs.

The rules on which a Court acts with respect to stale demands, are never more properly applied than where the nature of the case throws the burthen of proof on the defendant. *Sibbering v. Earl of Balcarra*
735

LANDLORD AND TENANT.

See SPECIFIC PERFORMANCE, 2.

LANDS CLAUSES CONSOLIDATION ACT.

See ANNUITY, 1.
INJUNCTION, 1.

LAND-TAX.

Guardians of an infant tenant in tail redeemed the land-tax on the entailed estate. The tenant in tail died, having bequeathed the land-tax to the next tenant in tail. The latter tenant in tail suffered a recovery and settled the estate, but always dealt with the redeemed land-tax as a subsisting charge. The settlement contained in its operative part the usual general words—"all the estate" &c.:—*Held*, that the land-tax was not merged by its redemption, by the recovery, by the operation of the settlement, or otherwise, but passed by a bequest of it in the settlor's will. *Blundell v. Stanley*,
433

LEASE

See SPECIFIC PERFORMANCE, 2.

LEGACY.

See MORTMAIN ACT.

VENDOR AND PURCHASER, 5.
WILL, 7, 8, 10.

LEGACY DUTY.

A cestui que trust of a portion of the proceeds of a contingent reversionary interest in an estate directed to be sold, in case of and upon the happening of the contingency, bequeathed his reversionary interest by his will to a legatee, who sold the same before the happening of the contingency. The executor was a party to the assignment, to obviate all question as to the existence of debts of the cestui que trust; and the purchase-money was thereby expressed to be paid to him, but was in fact paid to the legatee by the purchaser:—*Held*, that the executor had no claim on the purchaser to be reimbursed the legacy duty, which, after the happening of the contingency, he was compelled to pay on the full value of the share. *Farwell v. Seale*,
359

LIEN.

See BILL OF EXCHANGE.

LUNATIC.

In a suit to which a lunatic and his committee were defendants, the Court declined, before decree, to make an order, on motion, substituting a new committee as a defendant. *Rudd v. Spears*,
374

MAINTENANCE

See INFANT, 2.

MANUFACTORY.

See INJUNCTION, 3.

MARRIAGE.

See SETTLEMENT.

MORTGAGE.

1. A bill was filed by a second mortgagee of three estates (each of which was subject to a distinct prior mortgage) for a foreclosure against the mortgagor, and an account against the prior mortgagees. The bill also sought to impeach a sale made by one of the prior mortgagees as an improvident one. It did not seek or offer to redeem the prior incumbrances:—*Held*, that the bill was not multifarious, but was demurrable, on the ground that it contained no offer to redeem. *Inman v. Wearing*, 729

2. Lands were limited to a father for life, with remainder as the father and his son should appoint, with remainder to the son in tail, with remainder to the father and son in fee. The father and son appoint in fee, by way of mortgage, with a proviso, that, on repayment of the mortgage-money, the mortgagees should convey the hereditaments to the father and son, their heirs or assigns, or as they should direct; and it was declared, as between the father and son, that the father should, during his life, keep down the interest on the mortgage-debt: *Held*, that the course of limitation of the estate was not changed by this proviso. *Hipkin v. Wilson*, 738

3. A mortgagee cannot have the usual order, where the bankrupt is not the mortgagor but a purchaser of the equity of redemption, although the vendors of the equity of redemption, with whom the bankrupt has covenanted to pay the debt, join in the petition, and pray to be at liberty,

MORTMAIN ACT.

after paying the deficiency, to prove for the amount. *Ex parte Keightley*, 583

4. A loan was made on a deposit of agreements for building leases, with a written memorandum; afterwards the leases were obtained and deposited in lieu of the agreements, but without any fresh memorandum:—*Held*, that, on the usual petition of the equitable mortgagee in bankruptcy, the order ought to be made as in cases of no written memorandum. *Ex parte Anderson*, 600

5. Equitable mortgagee by deposit of shares in a public Company without written memorandum, *held* entitled to his costs, on evidence of custom not to give written memorandum. *Ex parte Moss*, 599

6. Where the solicitor to the suitors' fund has been appointed to act, and acts as guardian for infant defendants in a foreclosure suit, at the request of the plaintiff, under the 28th Order of October, 1842, the Court, upon making a decree of foreclosure, will direct the plaintiff to pay the guardian's costs, and to add them to his own, even where the security is inadequate. *Harris v. Hamlyn*, 479

See HUSBAND AND WIFE, 2,
TRUSTEE, 4.

MORTMAIN ACT.

A testator gave pecuniary legacies to charities, and directed them to be paid out of such of his ready money, goods, and personal effects, as he might, by law, charge with the payment of the same:—*Held*, not sufficient to throw the debts, funeral and testamentary expenses, and debts and legacies not charitable, on the mixed personalty, so as to leave the pure personalty for the charitable legacies. *Robinson v. Geldard*, 499

MOTION.

See SERVICE, 2.

MULTIFARIOUSNESS.

See MORTGAGE, 1.

NEW RIVER SHARES.

A testator, being possessed of a part of a share in the New River Company, by his will, executed so as to pass real estate, gave all his property to J. H., in trust for purposes and legacies the testator should make in any codicil. The testator, by a codicil not attested so as to affect real estates, gave several pecuniary legacies, and died without otherwise disposing of his property; the testator left no heir. Upon a question between the devisee of J. H. and the Crown:—*Held*, that New River shares were real estates for all purposes; and the Court declared that J. H. took the shares beneficially. *Davall v. New River Company*, 394

NOTICE.

See CERTIFICATE, 2.

OFFICIAL ASSIGNEE.

Where a trader assigned all his property for the benefit of all his creditors, and, a few days afterwards, sued out a fiat against himself, under which the official assignee took possession of property comprised in the deed, the Court ordered the property to be delivered up to the trustees of the deed, without any deduction in respect of the official assignee's poundage. *Ex parte Bainbridge, Re Stainton*, 620

PARENT AND CHILD.

See INFANT, 3, 4.

PARTIES.

1. In a suit for an account by a surviving partner against a debtor to the firm, it is not in general necessary to make the personal representative of the deceased partner a party. *Haig v. Gray*, 741

2. A shareholder in an incorporated Company, on his own behalf alone, filed a bill against the Company and the directors, but not making in any other manner, by representation or otherwise, any other member of the corporation a party, the object of the suit being to prevent the Company from making only a part of the line, and from applying to Parliament for authority so to do:—*Held*, that the suit was defective for want of parties, the case being analogous to that of a suit by a cestui que trust against a trustee complaining of a breach of trust, and not making other cestuis que trustent parties; and a demurrer ore tenus on this ground was allowed, without costs. *Cooper v. Earl of Powis*, 688

3. By the rules of a building society, members were at liberty to withdraw on giving notice, and on certain terms as to the return of a portion of their subscriptions. A bill was filed by some members who had withdrawn, on behalf of themselves and the other members of the society (except the defendants), against the directors, charging them with fraud, and seeking an account of all the dealings and transactions of the society; and that the defendants might make good the losses arising from their fraud, breach of trust, wilful neglect, or default:—*Held*, that the members who had not withdrawn, ought to be parties by representation or otherwise, and were not sufficiently represented by either the plaintiffs or the defendants. And the bill not alleging that their names were un-

PAYMENT OUT OF COURT.

known to the plaintiffs, a demurrer for want of parties was allowed.

The usual reference in a bill to a document itself, part of which alone is stated, does not entitle the plaintiff, on demurrer, to read the parts of the document which are not set out. *Harmer v. Gooding*, 407

See AWARD.

TRUSTEE, 4.

PARTNERS.

Two partners traded as merchants at Liverpool and Barbadoes, one residing and transacting the business at each place. The Liverpool partner, without the authority or knowledge of the other, laid out partnership monies in the purchase of railway shares in his own name, but on account of the partnership, and in substance declared himself a trustee of the shares for the firm. Afterwards the firm became bankrupt:—*Held*, 1st, that the joint estate had no right of proof against the separate estate of the Liverpool partner for the amount laid out upon the shares; 2nd, that the shares ought to be administered as joint estate; and that the clause as to reputed ownership did not apply.

Where a party, who upon an original hearing of a petition was represented by the respondent, petitioned for a rehearing, describing himself as resident abroad, he was required to give security for costs. *Ex parte Hinda*, 613

See ELECTION, 2.

EVIDENCE, 2.

PARTIES, 1.

TRUSTEE, 3.

PAYMENT INTO COURT.

See VENDOR AND PURCHASER, 1.

PAYMENT OUT OF COURT.

Where a fund bequeathed to one

PLEADING.

for life, with remainder to a class, (the members of which, as well as their shares, had been ascertained by the Master), had been carried to a separate account, the Court, on petition, presented after the death of the tenant for life, directed the transfer of one-ninth part of the fund to the person who appeared on the report to be entitled thereto, without service of the petition on the persons entitled to the other eight-ninths. *Lambert v. Newark*, 495

See ISSUE.

TRUSTEE, 2.

WINDING-UP ACTS, 28.

PETITION.

See COSTS, 4.

INFANT, 2.

TRUSTEE, 4.

WINDING-UP ACTS, 3, 4, 5, 8, 9, 10, 11, 14, 15.

PLEA.

Where a plaintiff, as one of a class, claimed a share of residue of a testator's estate against his executors, a plea by them of the plaintiff's illegitimacy, to be valid, must be put in on oath. Where this was not done, a plea was taken off the file of the Court. *Wild v. Gladstone*, 740

PLEADING.

1. An incorporated Railway Company issued new shares, in pursuance of a resolution declaring the purpose of such new issue to be the raising of a sufficient amount to pay off the existing mortgage and bond debts of the Company.

The holder of some of the new shares filed a bill, on behalf of himself and other holders of the shares, against the directors and the Company, alleging facts to shew, and

charging, that they were about to apply the money paid in respect of the shares otherwise than in conformity with the resolution; and praying for a declaration that the money ought to be applied according to the terms of the resolution, and for a specific performance of the agreement thereby entered into, and for an injunction:—*Held*, allowing demurrers of the directors and the Company, that the case fell within the authority of *Mozley v. Alston*; but the costs of only one demurrer were allowed. *Yette v. Norfolk Railway Company*, 293

2. The bill stated, that defendants, relations of a testator, had acquired influence over his mind, and had induced him to make by his will an improper and unequal distribution of his property among his relations, to the plaintiff's prejudice. It then stated, that, after the execution of the will, the testator became of unsound mind; and, while in that state, made underleases and transfers of stock in favour of the same defendants, and by their procurement; and the bill prayed that these underleases and transfers might be set aside.

The defendants by their answer admitted, that, by their attention to the testator, they might possibly have acquired some influence over his mind; but they denied that they had ever used it to the prejudice of the plaintiffs.

Held, that, upon these pleadings, the plaintiffs could not impeach the underleases and transfers on the ground of their having been obtained by undue influence, no such issue being raised by the bill, and the allegation or the answer not having the effect of enlarging the issues for this purpose. *Hayward v. Purasey*, 399

3. A cross-bill was filed by a defendant to an original suit, relating to the subject of that suit, and setting forth facts, not contained in the

original bill, and forming a defence to it, and praying a discovery, and that the suit might be taken as a cross-suit, and for general relief. The original bill was then dismissed, with costs, by an order of course, on the motion of the plaintiff; but the plaintiff in the cross-suit insisted on proceeding with his suit. A demurrer to such cross-bill was overruled. *Powell v. Hall*, 456

See AWARD.

INTERPLEADER.

MORTGAGE, 1.

PARTIES.

PLEA.

SETTLEMENT, 1.

POLICY.

See INFANT, 2.

PORITION.

See ACCUMULATION.

POWER.

1. The donee of a power of appointment of a fund among her children, to whom the fund was limited in default of appointment, had only two daughters, and apportioned nearly the whole of the fund to one of them, who was unmarried, on an understanding, but without any positive agreement, that the appointee would re-settle one moiety of it on trusts for the separate use of the other daughter, who was married, exclusively of her husband, and, after her death, on trusts for her children. A re-settlement was accordingly made, without the privity of the married daughter, who did not hear of the transaction until several years afterwards:—*Held*, on the suit of her husband, that the appointment was invalid, and a settlement was di-

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rected to be made of the married daughter's share. *Salmon v. Gibbs*, 343

2. The circumstances that a testatrix had not nearly sufficient property of her own to satisfy the legacies bequeathed by her, and that the legacies added together exactly amounted to a sum over which she had a power of appointment by will—held not sufficient grounds for deciding that the will (executed before the Wills Act of 1837 came into operation) was a good execution of the power, there being no reference to the power in it.

Bequest to such persons as the testator's wife should appoint, and, for want of appointment, to her "surviving" brothers and sisters:—*Held*, to refer to brothers and sisters who survived her. *Davies v. Thorn*, 347

See JURISDICTION.

Will, 5.

PRACTICE.

See AFFIDAVIT.

COSTS, 1.

CREDITOR'S SUIT.

DISMISSAL.

EVIDENCE, 1, 2.

EXAMINATION.

INJUNCTION, 5.

ISSUE.

MORTGAGE, 6.

PAYMENT OUT OF COURT.

PLEA.

PUBLICATION.

SERVICE.

SETTLEMENT, 1.

TRUSTEE, 2.

VENDOR AND PURCHASER, 1, 2, 4.

WINDING-UP ACTS, 17, 18, 21.

WITNESS.

PRECATORY WORDS.

See WILL, 11.

PREFERENCE SHARES.

See CONTRIBUTORY, 16.

PROOF.

PREMIUMS.

See PROOF, 3.

PRODUCTION.

See WINDING-UP ACTS, 23.

PROOF.

1. The amount of a call made upon a contributory under the Joint-stock Companies Winding-up Act, 1848, before his bankruptcy, may be proved against his separate estate by the official manager, although all the debts of the Company are not paid, for which the contributory is liable.

Where the direction of the Master had not been obtained before a proof was tendered by the official manager under a bankruptcy, but no objection was made on this ground to the admission of the proof before the Commissioner, and the Court, on appeal, was satisfied that the proceeding was not disapproved of by the Master:—*Held*, that it was not competent to the assignees to object, on appeal from the Commissioner's decision, that the Master's approbation had not been obtained before the proof was tendered. *Ex parte Brown*, 590

2. A trader, upon his daughter's marriage, covenanted to pay, so long as the intended husband and wife, or any issue of the marriage, entitled under the provisions of the settlement, should live, such a sum as with the annual produce of any property which might be received as therein mentioned, would amount to 150*l.*:—*Held*, that the payments of the annuity becoming due after the issuing of a fiat against the trader could not be proved. *Ex parte Evans*, 561

3. A trader covenanted by an antenuptial settlement to pay the premiums on certain assigned policies of insurance on his life, or, if he failed to do so, to repay to the trustees the

amount which they should pay in respect of the premiums. On his becoming bankrupt:—*Held*, that the trustees could not prove for the amount required by the offices to be paid to keep up the policies during the remainder of the bankrupt's life. *Re Whitmore*, 565

See CLERK.

TRUSTEE, 3.

VENDOR AND PURCHASER, 6.

PROPERTY TAX.

In paying a creditor who has proved in an administration suit upon a bill of exchange, income tax is deducted from the interest. *Dinning v. Henderson*, 702

PROSECUTION OF ORDER.

See WINDING-UP ACTS, 26.

PROTECTION.

A bankrupt, who had unsuccessfully applied to be discharged from imprisonment under the protection clause of the Bankrupt Law Consolidation Act, 1849, renewed his application after his last examination:—*Held*, that it was to be regarded as an original application, and that its refusal gave a new right of appeal.

Where a bankrupt is in prison when he obtains his protection, the Court will not order him to be discharged, unless it appears that his discharge will be useful in the administration of his estate.

Quere, whether costs of proceedings in bankruptcy before the Vice-Chancellor are within the 249th section of the Bankrupt Law Consolidation Act, 1849. *Ex parte Jones*, 671

PROVISIONAL COMMITTEE-MAN.

See CONTRIBUTORY, 17, 18, 19, 20.
WINDING-UP ACTS, 4.

PUBLICATION.

Upon a motion, by way of appeal from the Master's decision, refusing to enlarge publication, the Court received in evidence new facts not before the Master, on which the Court directed the publication to stand enlarged; but, as the order was obtained upon materials which were not before the Master, the appellant was ordered to pay the costs of the motion. *James v. Grissell*, 290

PUBLIC COMPANY.

The 29th section of the Joint-stock Companies Registration Act, 1849, requiring any contract or dealing between a Company and any director (except as therein mentioned), to be submitted to a meeting of shareholders, extends to a loan of money from a director to the Company. *Tever-sham v. Cameron's Coalbrook Steam Coal and Swansea and Lougher Railway Company*, 296

See ANNUITY, 1.

INJUNCTION, 1, 2, 4.

MORTGAGE, 5.

PARTIES, 2.

PLEADING, 1.

SPECIFIC PERFORMANCE, 1.

WINDING-UP ACTS, 2, 3, 6.

RAILWAY COMPANY.

See ANNUITY, 1.

INJUNCTION, 1, 2, 4.

PLEADING, 1.

SPECIFIC PERFORMANCE, 1.

WINDING-UP ACTS.

REAL ESTATE.

See NEW RIVER SHARES.

RECTOR.

See BENEFICE.

REDEMPTION, EQUITY OF.

See MORTGAGE, 2.

REFERENCE.

See WINDING-UP ACTS, 14.

REHEARING.

See CONTRIBUTORY, 31.

RENEWAL.

See SPECIFIC PERFORMANCE, 2.

RESCINDING.

See VENDOR AND PURCHASER, 6.

RETIRED DIRECTOR.

See CONTRIBUTORY, 21, 22, 23.

REVERSION.

See LACHES.

REVOCATION.

See WILL, 8.

SALE.

See VENDOR AND PURCHASER, 2, 3.

SALE UNDER DECREE.

See VENDOR AND PURCHASER, 1, 4.

SCRIPHOLDER.

See WINDING-UP ACTS, 2.

SECURITY.

See COSTS, 1.

WINDING-UP ACTS, 15.

SEPARATE ESTATE.

See PARTNERS.

SERVICE.

1. *Semble*, that service of a copy of a bill, at the defendant's house, upon a member of his family, is not sufficient, unless the member of the family is an inmate of the house. *Edgson v. Edgson*, 629

2. Where a defendant moves to suppress any of the depositions taken on behalf of the plaintiff, the co-defendants need not be served with notice of the motion. *Barnard v. Papineau*, 498

3. Order for substituted service to appear and answer on alleged agent and receiver of defendants, who were mortgagees in possession. *Bankier v. Poole*, 375

See PAYMENT OUT OF COURT.

WINDING-UP ACTS, 3, 16, 17, 18, 19, 20, 21.

SETTLEMENT.

1. A father, in contemplation of the marriage of his son, proposed, in writing, to settle an estate in a specified parish, "worth 200*l.* a year," free from incumbrances, on himself for life, with successive remainders to his son and his intended wife, and the children, charged with 50*l.* a year to his own widow, for life. By a settlement, not referring to the proposal, the father conveyed an estate, held in fee, worth 57*l.* a year, and an estate of which he was tenant for life, with limitation to his son in tail, of the yearly value of 190*l.*, both in the specified parish, to the proposed uses, and absolutely covenanted that the conveyed hereditaments were of the annual value of 200*l.*, and that he was absolutely seised in fee of them. The marriage took effect, and both the son and his wife died, leaving an infant daughter; the son had married a second time, and left a son, who became tenant in tail of the hereditaments worth

190*l.* a year. In a suit by the infant daughter and the trustee of her settlement, against the representatives of her grandfather, the settlor, for damages for the breach of his covenant:—*Held*, that the proposals could not be looked to as defining the value of the property to be settled; and that the plaintiffs were entitled to damages to the full extent of the value of the settled land, though that would create a total income under the settlement of 247*l.* instead of only 200*l.*

Semble, that, where an infant, joining in a suit with other plaintiffs, asks by her bill less than she is entitled to, the Court will, at the hearing, give liberty to file a new bill, and even order one to be filed. *Wace v. Bickerton*, 757

2. By a marriage settlement, a sum of money was settled upon trusts for the husband for life, then for the wife for life, and, after the death of the survivor, upon trust to pay the principal among all the children and issue of the intended husband, to be by him begotten on the body of the intended wife; and if there should be no child or issue of the marriage, or, being such, they should all die in the lifetime of the survivor of the husband and wife, upon other trusts:—*Held*, that the children of the marriage, including those dying in the lifetime of the survivor of the husband and wife, took the fund, and that no other issue were entitled. *Gordon v. Hope*, 357

See HUSBAND AND WIFE, 1.
MORTGAGE, 2.

SHARE.

A shareholder in an incorporated Railway Company instructed a stock-broker to sell his shares. The broker agreed with a jobber for the sale of them; but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B.

(another broker), who, as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; and the jobber granted the time on B. giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B., who paid the price to the vendor, and took the deed of assignment executed by the vendor:—*Held*, upon a bill filed by the vendor, that B. was bound to execute the assignment, to procure himself to be registered, and to pay the calls made since the execution of the assignment by the vendor, and to indemnify the vendor against future calls; and a decree was made to that effect. *Wynne v. Price*, 310

See MORTGAGE, 5.

SOLICITOR.

1. The Court refused to restrain, at the instance of an administratrix, a solicitor who had acted on behalf of the administratrix in the affairs of her intestate's estate, from acting as the solicitor of some of the next of kin in a suit for the administration of the estate. *Hutchinson v. Newark*, 727

2. An assignee, who had acted as solicitor to the fiat, was allowed to charge for his clerk's time employed in the business of the bankruptcy, as costs out of pocket, but not any profit thereupon. *Ex parte Newton*, 584

See WINDING-UP ACTS, 27.

SPECIAL CASE.

See COSTS, 2.

SPECIFIC PERFORMANCE.

1. A Railway Company, contemplating a new branch and endeavour-

ing to obtain an Act for the purpose, contracted with a tenant for life for the purchase of the fee, and to obtain in their Act necessary powers for this purpose. Under the Act which they obtained, it was a question whether they had power to take more than a portion of the land:—*Held*, that they were nevertheless bound specifically to perform the agreement.

Quere, whether the same decision would have been given if the Company had, throughout, acted with good faith, and it had been certain that the tenant for life could have obtained adequate compensation at law. *Hawkes v. Eastern Counties Railway Company*, 743

2. The landlord of a workshop, which he held under a lease, agreed in writing to underlet it at a yearly rent, with an option to the tenant to take an underlease upon the same terms for twenty-one years from the previous Lady-day. The tenant continued in possession under this agreement for four years, when he received notice to quit. He then applied to his landlord for a lease for twenty-one years, according to the agreement. Some months afterwards, the landlord obtained possession of the premises under a warrant of possession from a District Court. The tenant filed a bill against the landlord for specific performance and an injunction. It appeared, at the hearing, that the tenant had not kept the premises in repair. The Court dismissed the bill with costs, and expressed a doubt whether the plaintiff had not, by his delay alone, lost his option to renew. *Nunn v. Truscott*, 304

3. An agreement was entered into for the purchase of a mansion-house and lands, admeasuring about ninety-six acres, comprised in particulars with the following statement:—"The whole is freehold, except about eight

acres, which is copyhold of the manor of C. (but undistinguished except as to not including any of the buildings)." Upon the abstract of title, one of the purchaser's requisitions was, that, as the abstract did not shew any connexion between the parcels described in the deeds abstracted and those set forth in the printed particulars, the vendors should establish the identity of the lands sold with those in the abstract. After some negotiation, but without compliance with this requisition, a supplemental agreement was entered into, by which possession was given up to the purchaser, he accepting the title subject to the vendors' producing a "declaration of identity of the lands mentioned in the deed to those sold." The vendors then produced a declaration, of which the purchaser's counsel approved, in proof of the local identity of the parcels, but not distinguishing the freehold from the copyhold parts. Subsequently, the purchaser procured evidence, shewing that it was highly probable that the mansion was built on the copyhold part of the property, and insisted that the vendors were bound to identify its site with the portion which was not copyhold. The vendors declined to furnish the necessary evidence. Upon a bill by them, to compel specific performance of the agreement:—*Held*, that the purchaser was not entitled to require such evidence of identity; and the Court decreed specific performance, with a declaration to that effect. *Dawson v. Brinkman*, 376

See SHARE.

STAMP.

See CHEQUE.

STAYING PROCEEDINGS.

See CREDITOR'S SUIT.

TAX.

SUBPOENA.

See SERVICE, 3.

SUBSTITUTED ROAD.

See INJUNCTION, 4.

SUMMONS.

A person alleging that he was a creditor of trader served him with a summons (under 5 & 6 Vict. c. 122), which was dismissed upon the alleged debtor deposing that he verily believed that he had a good defence to the demand. Afterwards, the Bankrupt Law Consolidation Act having passed, the alleged creditor served the trader with another summons for an alleged debt, which was in part composed of the former demand:—*Held*, that the former dismissal was not of itself a sufficient answer to the summons. *Ex parte Alcock, Re Wearing*, 654

SURRENDER.

A bankrupt obtained an order for leave to surrender, and for his costs to be paid out of the estate, on a petition supported by his affidavit, stating, that his surrender had been prevented by his having left England on account of family disagreements. The petition was unopposed. On appearing before the Commissioner to surrender, he was examined, and stated that he left England on account of his embarrassments. The assignees thereupon petitioned to have the former order discharged; but the Court refused to discharge it, holding that the circumstance would be properly regarded when the bankrupt applied for his certificate. *Ex parte Pennell, Re Turner*, 555

TAX.

See PROPERTY TAX.

TRADER DEBTOR. 823

TAXATION.

See COSTS, 3.

TENANT FOR LIFE.

See WILL, 7.

TENANT IN TAIL.

See LAND-TAX.

THELLUSON ACT.

See ACCUMULATION, 1, 2.

TIME.

See AMENDING.

DISMISSAL.

LACHES.

WINDING-UP ACTS, 29.

TIME FOR APPEAL.

See PROTECTION.

TITLE.

See VENDOR AND PURCHASER, 3.

TRADER.

See CERTIFICATE, 1.

TRADER DEBTOR.

Semble, that the 79th section of the Bankrupt Law Consolidation Act, 1849, does not render it imperative upon the Commissioners to require a trader, summoned under that section, to enter into a bond.

Upon such a summons, if either the trader or the creditor tenders himself to be examined, his examination ought to be taken. But it is not incumbent on the Court to hear any other witnesses. *Ex parte Sheward, Re Sheward*, 609

See SUMMONS.

TRADING.

A barrister, who took leases of three pieces of ground, and built houses upon them for the purpose of letting—*Held*, not to be a builder within the meaning of the bankrupt laws; but, on it appearing that he had accepted a bill, addressed to him by the description of "builder," and had brought an action for slander, on the ground that the word complained of injured him as a trader, the fiat was annulled without costs. *Ex parte Stewart, Re Stewart*, 557

TRANSFER.

See CONTRIBUTORY, 13, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34.

TRUST.

See ACCUMULATION, 1.
WILL, 11.

TRUSTEE.

1. Trustees were directed by a will to place the trust monies in the public funds, or on some good and approved freehold or leasehold securities, at interest. The trustees, acting bonâ fide, had, in 1828, upon the report of a surveyor, (who had valued the property at 3500*l.*, and the annual rental at 175*l.*), lent 2600*l.*, part of the trust monies, upon a mortgage, with powers of sale, of the valued property, and which consisted of four freehold messuages, at the time in an unfinished state, the actual yearly rent of which being only 105*l.* The mortgagor having become insolvent, the trustees sold the property in 1836, which then realised less than the amount lent by 353*l.* 4*s.* 2*d.*, and that sum was lost to the estate. In a suit by a cestui que

trust, the Court declined to charge the trustees with the loss, and allowed them their costs of suit, and their costs, charges, and expenses. *Jones v. Lewis*, 471

2. An executor, three years after the death of his testator, paid the balance of the testator's assets in his hands into Court, under the Act for the relief of trustees. Afterwards, the executor discovered that there were debts of the testator to a considerable amount unpaid. Upon his petition, the money paid in was paid out to him, on his undertaking properly to apply the fund. *Ex parte Tournay*, 677

3. A partner in a bank drew out part of a balance standing to the account of trustees of a will, under which he was interested, without the authority of the trustees, and invested it upon a canal mortgage, which was an unauthorised security:—*Held*, on the bankruptcy of the bankers, that the cestuis que trustent were entitled to prove for the whole of the balance, without giving up the canal mortgage. *Ex parte Biddulph, Re Biddulph*, 587

4. Where a trustee invested part of the trust monies upon a mortgage, with a power of sale, and a trust for the mortgagor, in the event of there being a surplus, and became bankrupt:—*Held*, that the mortgagor was not a necessary party to a petition, under the Bankrupt Law Consolidation Act, for the appointment of a new trustee. *Ex parte Marshall, Re Haskayne*, 670

5. A petition for the appointment of a new trustee in the place of a bankrupt, under the Bankrupt Law Consolidation Act, should be addressed to the Lord Chancellor, and heard by the Court of Chancery.

Where the bankrupt was served with such a petition he was held en-

titled to his costs. *Ex parte Cartwright, Re Yates*, 648

See CONTRIBUTORY, 34.
WINDING-UP ACTS, 27.

UNDUE INFLUENCE.

See PLEADING, 2.

VENDOR AND PURCHASER.

1. Property was sold under a decree, subject to conditions, one of which was, that the purchase-money was to be paid into Court on or before the 30th of November, or that interest should be paid from that time at 5*l.* per cent. The abstract was not delivered till October 18th; and the deeds were in the hands of mortgagees, who declined producing them without payment. On the purchaser's application on the 15th of December, the Court allowed him to pay in the principal and interest up to that day, without prejudice to any question and without acceptance of title. *Rutley v. Gill*, 640

2. Where a reference had been directed to inquire whether an offer for the purchase of leaseholds was beneficial, and ought to be accepted, and the Master reported in favour of the purchase:—*Held*, that the purchasers were entitled to the rents from the date of the order of reference. *Cheetham v. Sturtevant*, 468

3. A purchaser under a decree of leaseholds presented a petition to be discharged from his purchase, on the ground that a share in the property had been bequeathed upon trusts, and that the bequest appeared, by inference from the pleadings, to have been assented to; but that some of the cestuis que trustent were infants, and were not before the Court. The assent was disputed:—*Held*, that the purchaser was not entitled at once to be discharged, but only to a reference

to the Master as to title. *Whitfield v. Lequeutre*, 464

4. Defendants in a cause where there has been a sale under a decree, ought to be served with the petition of a purchaser to be discharged from his purchase.

In September, 1848, a purchaser bought under a decree, and by his requisitions on the title required a receipt to be given by a trustee having power to give receipts, but who was by mistake stated in the pleadings to have disclaimed, and was not a party to the cause. Afterwards, the purchaser required that the trustee should be brought before the Court by supplemental bill. In the course of the discussions on these subjects, it was objected by the purchaser that an additional cestui que trust ought to have been brought before the Court. The plaintiff acceded to this, and promised that the defects complained of should be supplied and remedied by a proper supplemental suit, and petition of rehearing, in which (as all parties were amicable) a decree might be obtained in three weeks. This took place in March, 1849. The purchaser, in answer to the proposal, declined waiting any longer, and demanded back his deposit and costs. He then presented a petition to be discharged from his purchase; but before the petition came on to be heard, the defects in the suit had been supplied:—*Held*, not a case for discharging the purchaser. *Sherwood v. Beveridge*, 425

5. A testatrix devised copyholds to A., subject to the payment of 400*l.* to a legatee. The legatee's husband attested the execution of the will. The devisee sold to a purchaser for the full value of the estate, both parties treating the legacy as void, and not noticing it in the conveyance. The purchaser afterwards resold:—*Held*, that the legatee had no remedy

in equity against the devisee, to recover from him, personally, the amount of his legacy. *Jillard v. Edgar*, 502

6. An agreement was entered into for the purchase of 4000 tons of iron rails, at 12*l*. 12*s*. 6*d*. per ton, according to a section, to be delivered by November 1st, 1846; and 11,500*l*. was to be paid by the purchaser by way of deposit. According to the custom of the trade, this deposit was to be retained by the seller as a security against any damages from the non-performance of the contract. The deposit was paid in bills of exchange. In June, 1846, the purchaser became bankrupt. On the bills becoming due, they were dishonoured:—*Held*, that the vendors were entitled to prove upon two of the bills remaining in their hands. *Ex parte Bolckow, Re Maclean*, 656

See LEGACY DUTY.

SHARE.

SPECIFIC PERFORMANCE, 3.

VOLUNTARY BOND.

See BOND.

WAIVER.

See CONTRIBUTORY, 27.

SPECIFIC PERFORMANCE, 3.

WIDOW.

See ELECTION, 1.

WIFE.

See HUSBAND AND WIFE.

WILL.

1. A testator made his will, duly attested so as to pass freehold estate, dated in 1828. In May, 1831, he made a codicil, which was attested by two witnesses only, declaring it to be a codicil to his will, and direct-

ing that it should be annexed thereto. This codicil varied the disposition of parts of his real estate. In September, 1831, he made a second codicil, duly attested so as to pass freehold estate, which he declared to be a second codicil to his will, and directed the same to be annexed thereto and taken as part thereof. The second codicil concluded by confirming his will:—*Held*, that the second codicil gave the same effect to the first codicil as if it had been duly attested by three witnesses. *Aaron v. Aaron*, 475

2. A testator, by will executed in 1838, gave the residue of his real and personal estate to trustees, upon trust, to pay an annuity to his wife, and to invest the sum of 1000*l*. and pay the interest to his son for life; and, after his decease, to any widow of his son; and, after her decease, upon trust, as to the principal, for his children; and subject to the annuity and to the above and another legacy, upon trusts expressed thus:—"In trust for all my children, in equal shares, and the heirs of their bodies, (except as to my son J. F. G., and his children and their issue, whose share, in consequence of the 1000*l*. set apart for him and them as aforesaid, shall be rated at 100*l*. less than the share of any other of my children); and in case there shall be a failure of issue of any of such children, then, as to the share or shares of him, her, or them, whose issue shall so fail, to the use of the others or other of them, and the several heirs of their respective bodies." The testator was possessed of freehold and leasehold property, and left J. F. G. and one other child:—*Held*, that J. F. G. was entitled in fee to half of the testator's freeholds, and absolutely to his leaseholds; that the parenthetical expression was merely explanatory; and that the 29th sec-

tion of the Wills Act did not affect the devise and gift. *Green v. Green*, 480

3. A testator, W., devised his real estates to trustees, upon trust to receive the rents, and, on his son John arriving at the age of twenty-five years, to let him into possession, but neither he nor his heirs to the third generation were to sell or mortgage the same, it being the testator's desire that the property should remain in the W. name. If John should die without leaving lawful issue, it was the testator's will that his daughter Ann should have his share, subject to the same limitations. If John and Ann should die under age, or without leaving issue, the testator devised the property, after deducting a certain sum from the produce in favour of his (the testator's) daughter Elizabeth, to and for the benefit of the plaintiffs. The testator had the three children named in his will living at his death, and no more. Elizabeth died at the age of two years; Ann survived her, and died at the age of nineteen years, unmarried; and John, the last survivor, died, aged thirty years, leaving children, who all died unmarried, and without issue. John, by his will, devised part of the father's real estate to the defendants:—*Held*, first, that the devisees of John, the son, took no estate in the hereditaments of W. the father, devised by his will; and, secondly, that the plaintiffs took the estates in the hereditaments of W. the father, and in such manner as given to them by the will of W. the father.

Where there is a doubtful question as to the legal title to an estate on the construction of a will, the practice is, not to determine it on demurrer, although the inclination of the Court may be in favour of the defendant, but to overrule the demurrer, without prejudice to the defendant's insisting on the same matters

by way of answer.—*Brownson v. Edwards* referred to on this point. *Mortimer v. Hartley*, 316

4. A testatrix in 1831 made a will, bequeathing as follows: "To the three children of my niece F. W., the sum of 500*l.* each." At the date of this will, F. W. had three children only, as the testatrix knew. F. W. subsequently had six other children, of the birth of each of whom the testatrix was informed. The testatrix, in 1836, 1842, and 1844, made three new wills, successively revoking the former, in each of which the bequest was repeated in the same words:—*Held*, that the bequest in the will of 1844 must be read as if the word "three" had been omitted, or had been the word "nine."

Two co-defendants were examined on behalf of defendants whose interests were not identical with their own:—*Held*, that their testimony was admissible in evidence. *Daniell v. Daniell*, 337

5. A testatrix gave a fund to A. and B., who were her executors, in trust to place out the same at interest, and to apply the interest thereof, or the principal, for the benefit of Mary Ann S., in such way as they might, in their discretion, think fit, during her life, it being the wish of the testatrix that they should dispose of the principal and interest, or any part, or should withhold the whole and let the interest accumulate; and, upon the decease of Mary Ann S., in case the trust-fund, or any part thereof, or interest, should then remain undisposed of, upon trusts for other persons. A. and B. paid the interest of the trust fund and 100*l.*, part of the capital, to Mary Ann S., and died without any other exercise of their discretionary power:—*Held*, that Mary Ann S. was entitled to the whole of the trust funds. *Gude v. Worthington*, 389

6. A testator directed his debts and funeral expenses to be paid, and gave to his wife all his estate, effects, goods, chattels, houses, lands, monies, securities for money, due or growing due, every matter and thing whatsoever and wheresoever the same might be at the time of his decease, for her sole separate use and benefit; and he further directed, that, at her decease, whatever remained of his estate and effects should go to and be equally divided, share and share alike, among certain specified persons, or such of them as should then be living:—*Held*, that there was a substantial gift after the widow's death. *Constable v. Bull*, 411

7. Unreceived dividends held not to pass under a bequest of the dividends and interest of all the testator's money in the funds to a legatee for life. *Shore v. Weekly*, 467

8. A testator, having by his will given a legacy of 5000*l.* to a married daughter, made a codicil revoking the legacy, and, in lieu thereof, gave 2500*l.* to her husband, and 2500*l.* in trust for the daughter and her children, free from all debts or liabilities of her husband:—*Held*, that the daughter was entitled to the income of the 2500*l.* for her life, with remainder to all her children as to the capital.

A testator devised all his real property to his youngest son and his heirs, but if he should die unmarried, then to his sisters and their heirs. By a codicil, he declared that he left in trust to his executors the whole of the property of every description which he had willed to his youngest son:—*Held*, that the beneficial disposition made by the will was not revoked, but that the executors took subject to the trusts thereby declared. *Froggatt v. Wardell*, 685

9. Devise unto and to the use of trustees, their heirs and assigns, upon trust to pay the rents and profits to a

married woman, for her separate use, for life; and, after her decease, in trust for all her children, who should attain twenty-one, or, being daughters, attain that age or marry, and their heirs and assigns for ever, as tenants in common:—*Held*, to give vested estates to all her children as they came into existence, subject to be divested on their deaths under twenty-one, and (if daughters) unmarried. *Riley v. Garnett*, 629

10. A testatrix bequeathed a sum of money, upon trust to pay the interest for the maintenance and education of an infant legatee, and directed, that, when the legatee should attain twenty-one, the principal should be paid to him; but if he should die before his legacy became payable, leaving lawful issue, such issue should be entitled to the legacy. And the testator bequeathed one moiety of his residuary estate, upon trust, to pay the income to a tenant for life; and, after her death, to pay the principal to the above-mentioned legatee, when his other legacy should become payable; with a bequest over in case of his death without leaving lawful issue. The legatee died in the lifetime of the tenant for life, having attained twenty-one, but without having been married:—*Held*, that his representatives were entitled to the moiety. *Woodburne v. Woodburne*, 643

11. A testatrix bequeathed 3000*l.* to a legatee, whom she appointed her sole executrix; and 3000*l.* in addition for the care and trouble she would have in acting as executrix. And the testatrix bequeathed all the rest, residue, and remainder of her personal estate to the same legatee, her executors, administrators, and assigns, "well-knowing" that she would make a good use and dispose of it in a manner in accordance with the testatrix's views and wishes. Among the testatrix's papers some writings were

found, made after the passing of the Wills Act, but not attested as required by that statute, denoting several charitable as well as other gifts, which the testatrix desired should be made. One of these was headed "my wishes."

Held, that there was no sufficient expression of intention that the executrix should take the residue beneficially, and that she therefore held it in trust for the next of kin.

Held, also, that the unattested papers could not be looked at for the purpose of ascertaining what the testatrix's intentions were. *Briggs v. Penny*, 525

See ELECTION, 1.
EVIDENCE, 1.
JURISDICTION.
POWER, 2.

WINDING UP ACTS.

As to the Order to Wind up.

1. A member of the managing committee of a provisionally registered Railway Company, who had declined to take any shares, and to whom no shares had been allotted, had paid 300*l.* to the solicitor employed on behalf of the Company, for costs:—*Held*, that he was entitled to have the Company wound up.

Where service on a member is sufficient, the affidavit of service need only state that the person served is a member. *Ex parte Cooke*, 148

2. A scrip-holder in a provisionally registered Railway Company, who has not signed the subscription contract, may present a petition to wind up the Company. *Ex parte Capper*, 1

3. Where a shareholder in a Railway Company had applied to the Court of Bankruptcy for protection, and had entered into an arrangement with his creditors, under 7 & 8 Vict.

c. 70:—*Held*, that he could not petition to have the Company wound up under the Joint-stock Companies Winding-up Act, without serving the petition upon the trustees under the deed of arrangement. *Ex parte Waller*, 2

4. Where members of the provisional committee of a projected Railway Company have, with others, incurred liabilities with reference to the intended Company, they are entitled to have the affairs of the Company wound up, although such liabilities may not affect the general body of subscribers. *Ex parte Holinsworth*, 7

5. A shareholder in a dissolved Railway Company had expressed himself satisfied with an account produced to him, and received, in 1847, a second dividend in part return of his deposit, and under the designation of a final dividend, leaving only 22*l.* of his deposit unreturned. In 1849 he presented a petition to have the Company wound up under the Act of 1848, when there appeared to be no debts due from the Company, nor any assets, except such as might be procured from re-opening the accounts, or recovering from subscribers the amounts unpaid on their deposits:—*Held*, not a case for a winding-up order, nor for ordering the petition to stand over to allow an inspection of the accounts of the Company. *Ex parte Murrell*, 4

6. Winding-up order made in the case of an Insurance Company, which had been dissolved and its business transferred to another office, there remaining a sum of 4000*l.* to be divided among the shareholders. *Ex parte Phillips*, 3

7. The circumstance that policies of a Life Insurance Company are still in force, and that the liabilities of the Company upon them cannot be settled for many years, is not suffi-

cient to render it inexpedient to make an order for winding-up such a Company, under the provisions of the Joint-stock Companies Winding-up Act, 1848. *Ex parte Dee*, 112

8. A Company was provisionally registered for making a railway of 170 miles, to complete the communication from London to the Western Coast of Ireland; and a subscription contract was executed, authorising the directors, among other things, to apply for an Act to construct only a portion of the line if they thought fit. Afterwards, a portion of the scheme was abandoned by the directors, and the deposits applied to procure an Act, which was obtained, for making a portion of the line, forty miles only:—*Held*, not a proper case for an order upon the petition of a scrip-holder under the original agreement for winding up the affairs of the Company, under the provisions of the Joint-stock Companies Winding-up Act, 1848. *Ex parte Fisher, Re Wexford and Valencia Railway Company*, 116

9. By the prospectus of a Joint-stock Company, provisionally registered in England, it was proposed to form a Company, to be constituted a "Compania Anonima" in Spain, for the construction of a railway in that country. It was therein stated that the affairs of the Company would be conducted by a board of directors in London, (where the Company had an office,) assisted by a committee in Madrid. The objects of the Company having failed:—*Held*, that the English law applied to such a Company; and that it was within the jurisdiction of the Court to dissolve the Company and wind it up.

In a Joint-stock Company, projected to consist of 120,000 shares, with a deposit of 2*l.* a share, 53,000 shares were subscribed for, and the deposits were paid upon them, prior

to February, 1846. The promoters obtained from the Spanish Government a right to construct a railway in Spain, and deposited 30,000*l.* as a guarantee for the formation of the railway, subject to forfeiture if the works were not proceeded with. The preliminary surveys were made, but litigation having arisen among the shareholders, no further progress was made in the undertaking, and the deposits of the Spanish shareholders were returned to them by the directors in Spain, upon an agreement to re-advance them when wanted:—*Held*, a proper case for ordering the Company to be wound up under the Joint-stock Companies Winding-up Acts.

Semble, that a Company ought not to be charged with the costs of more than one petition for an order to wind up its affairs. *Ex parte Turner, Re Madrid and Valencia Railway Company*, 127

10. Upon a petition to wind up a Company under the Winding-up Acts, a preliminary inquiry was directed as to the expediency of making the order, although the petition was unopposed. *Re Great Eastern and Western Railway Company*, 218

11. Where, upon a petition for an order under the Winding-up Act, it did not appear that there existed any debt or liability of the Company, or that the petitioner had sustained or was likely to sustain any loss in respect of any debt of the Company, and no assets were shewn to exist except such as might arise by compelling the directors to make good monies expended by them in purchasing shares to enhance the price of them in the market:—*Held*, not a proper case for an order. And the transactions complained of having occurred five years before the presentation of the petition, and having been the subject of an investigation

and a suit instituted four years previously, and compromise, and also of another petition which had been abandoned on a compromise, the new petition was dismissed with costs. *Ex parte Inderwick, Re Great Munster Railway Company,* 231

12. The Court will not interfere under the Winding-up Acts, where there are judicial grounds for holding it not expedient to do so. A Joint-stock Banking Company, established in India, having correspondents and liabilities in this country, suspended payment in India, and proceedings had been taken there by arrangement between certain shareholders in the Company and some of the creditors, in pursuance of which others of the shareholders were sued, who refused to contribute to the payment of the debts according to an assessment unequally made. A shareholder who was thus sued petitioned to have the affairs of the Company wound up under the Winding-up Acts; but the Court, presuming on the whole against the expediency of its interfering, declined to make the order, leaving those concerned to their ordinary remedies. *Ex parte Watson, Re Bank of Calcutta,* 253

13. This Court will make the usual order for winding-up the affairs of a Company on the petition of a plaintiff in a suit against the directors for a similar object, without requiring the petitioner to pay the costs of the suit, leaving the question of the costs of the suit to be considered in the suit. *Ex parte —, Re Basterne Bitumen Co.* 265

14. Where the circumstances of the case rendered it doubtful whether there ever had been such a Company as that sought to be wound up, the Court referred it to the Master, to inquire whether the alleged Company ever existed; and if it had existed, whether it was proper that it should be wound up. *Re North Western Trunk Company,* 266

15. A petitioner for the usual winding up order, described in his petition as of a place out of the jurisdiction of the Court, was ordered, on the suggestion of the respondent, to give security for costs, as a preliminary condition to hearing the petition.

Proceedings had been taken in Scotland against a member of a Joint-stock Company, in respect of liability of the partnership:—*Held*, a proper case for winding up the Company on his petition. *Ex parte Latta, Re Royal Bank of Australia,* 186

Practice.

16. The Master has jurisdiction to order substituted service of an order upon a contributory for payment of a call.

Form of such an order. *Ellis's case, Re Kollmann's Railway Locomotive and Carriage Improvement Company,* 172

17. In cases in which the Joint-Stock Companies Winding-up Act (1848) requires service of the petition for winding up a Company upon an officer or member, there must, in general, be actual service; and an appearance by counsel to consent, at the hearing, is not sufficient. *Re Tring, Reading, and Basingstoke Railway Company,* 10

18. Service of petition for winding up Company on its solicitor, not sufficient within 10th section of Act. *Ex parte Dale, Re Trent Valley and Chester and Holyhead Continuation Railway Company,* 11

19. Formal service of a petition for winding up a Company upon a secretary, *Held* not requisite, where the secretary was present when the presentation of the petition was agreed to, and appeared by counsel to consent to it at the hearing. *Ex parte Wolesey, Re Great Western Railway Company of Bengal,* 101

20. A petition to discharge a winding-up order must be served on the interim manager, if one has been appointed. *Ex parte Coleman, Re Cambrian Junction Railway Company*, 139

21. The affidavit of service of a petition to wind up a Company under the Winding-up Acts must state or shew that the person on whom it has been served is a member, officer, or servant of the Company; and it is not sufficient to state that he is a member of the provisional committee. *Re London and Dublin Approximation Railway Company*, 208

Miscellaneous.

22. The sharebrokers of a provisionally-registered Company, who were also holders of shares, and had signed the Company's deeds, borrowed of the directors part of the Company's monies, to enable them to complete a large purchase of shares in the market, and deposited as a security the purchased shares and some of their original shares:—*Held*, that the monies borrowed were not due from them as members and contributories of the Company, so as to authorise the Master summarily to order them, in that character, to pay the amount under the 66th section of the Joint-stock Companies Winding-up Act, 1848. *Coz's case, Re Tring, Reading, and Basingstoke Railway Company*, 180

23. The 28th section of the Joint-stock Companies Winding-up Act, 1848, providing that, immediately after the appointment of an official manager, the Master shall direct that all deeds, &c., belonging to the Company shall be delivered up by every person in whose custody they may be, only authorises the Master to make a general order, and does not empower him to make, *ex parte*, an order directed to a particular individual to

deliver up documents in his custody. *Pell's case, Re Warwick and Worcester Railway Company*, 170

24. A plaintiff in an action at law against a member of a Joint-stock Company for goods supplied to the Company, was stayed by a Judge at Chambers, at the instance of the defendant, after an order had been made to wind up the Company under the Winding-up Act, until after proof of the debt should be made before the Master. The plaintiff at law then went in before the Master, who disallowed the proof. The Court on motion gave the plaintiff at law leave to take or prosecute such proceedings at law as he might be advised. *Armstrong's case, Re Patent Elastic Pavement and Kamptulicon Company*, 140

25. It was stated on behalf of the official manager, that the assignees of a bankrupt contributory had made such payments in respect of shares held by the bankrupt as would render the assignees personally liable as contributories, and that this would appear by the accounts signed by the assignees, and appearing upon the bankruptcy proceedings. The Commissioner acting in the bankruptcy declined permitting the Registrar to attend with the proceedings to verify this statement. The official manager then summoned before the Master the surviving assignee, who stated, that he could not, without inspecting the proceedings, say whether he had signed such accounts; and that he believed that he had no right to inspect them for the purpose of enabling him to answer the question. His examination was adjourned, to enable him to apply for leave to inspect them; but, on his again appearing, he had not done so:—*Held*, that his answers were unsatisfactory; and *semble*, that they rendered him liable to be committed under the 12 & 13 Vict.

c. 108, s. 19. *Stone's case, Re German Mining Company*, 120

26. Where a winding-up order had been obtained by a petitioner, who abandoned it, upon a compromise with the directors, before carrying it into the Master's office, the Court gave the prosecution of the order to a second petitioner; and on the death of such second petitioner before he had taken any further step in the matter, the Court, upon an ex parte motion, gave the carriage of the order to another shareholder. *Ex parte Baker, Re Larne, Belfast, and Ballymena Railway Company*, 242

27. The directors of a provisionally-registered Railway Company paid to solicitors employed by the Company a sum of money in respect of their bill of costs, which was not then delivered, and which, when delivered, fell short of the sum paid. The balance was claimed by the assignees of another solicitor, who had acted jointly with the former, in respect of certain extra costs not included in the bill; and the first-mentioned solicitors also claimed a lien in respect of subsequent costs:—*Held*, irrespectively of these claims, that the balance was not in the hands of the solicitors as "agents or trustees" for the Company, so as to give jurisdiction to the Master, under the 66th section of the Winding-up Act of 1848, to direct it to be paid to the official manager. *Hollingsworth's case, Re Direct London and Exeter Railway Company*, 102

28. An order had been made to wind up a Company, but no person had been placed on the list of contributories, and no creditor had made any claim. On the application of directors

(who were the holders of 6490 out of 7325 shares), the consent of the official manager and original petitioner, and evidence that the remaining shares could not be heard of, and that the petitioners had paid, in respect of liabilities of the Company, more than the amount of the assets in the hands of the official manager, the Court ordered that amount to be paid to the petitioners on their undertaking to account for it, and stayed all proceedings under the winding-up order. *Re Worcester, Tenbury, and Ludlow Railway Company*, 189

29. Leave given to a person to dispute his liability to be placed on the list of contributories, after he had (acting under wrong advice as to the law) suffered the time appointed for that purpose by the Master to elapse. *Holt's case, Re Liverpool and Manchester Saw Mills and Timber Joint-stock Company*, 99

See CONTRIBUTORY.
PROOF, 1.

WITNESS.

Where it appeared upon affidavit thrt a material witness was going abroad, an order was made upon motion that the defendant should be at liberty to examine him *de bene esse*; and it was held not to be necessary that the affidavits should disclose the points to which it was proposed to examine the witness, or that he was the only witness who could give evidence on the points. *Grove v. Young*, 397

See EVIDENCE, 3.
WINDING-UP ACTS, 25.

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